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In the Supreme Court of the United States

MATTHEW CATE, *Petitioner, et al.*

v.

JOHN PIRTLE, *Respondent, et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I OF II

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INDEX TO APPENDIX

VOLUME I OF II

Page

PIRTLE CASE

Ninth Circuit Opinion
Granting Habeas Corpus Relief
Pirtle v. *California Board of Prison Terms*
Case No. 07-16097 . . . . . 1a-20a

California Supreme Court Order
Denying Habeas Corpus Relief
In re John Herman Pirtle
Case No. S119114 . . . . . .21a

California Court of Appeal Order
Denying Habeas Corpus Relief
In re John Herman Pirtle
Case No. C044757 . . . . . 22a

California Superior Court Order
Denying Habeas Corpus Relief
In the Matter of John H. Pirtle
Case No. 71619 . . . . . .23a-25a

Ninth Circuit Mandate
Pirtle v. *California Board of Prison Terms*
Case No. 07-16097 . . . . . .26a

Ninth Circuit Order Denying
Petition for Rehearing En Banc
Pirtle v. *California Board of Prison Terms*
Case No. 07-16097. . . . . .27a

Board of Prison Terms Hearing Transcript
Decision Pages. 28a-34a

District Court Findings and Recommendations
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 35a-80a

District Court Order Adopting Findings and Recommendations
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 81a-82a

District Court Judgment
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 83a

District Court Order Granting Immediate Release
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 84a-85a

California Supreme Court Letter
In re John Herman Pirtle
Case No. 07-16097. . . . . 86a

JOHNSON CASE

Ninth Circuit Mandate
Johnson v. *Finn*
Case No. 06-17042. . . . . 87a

Ninth Circuit Order
Temporarily Granting Motion to Stay the Mandate
Johnson v. *Finn*
Case No. 06-17042. . . . . .88a-89a

Ninth Circuit Order
Denying the Petition for Panel Rehearing
Johnson v. *Finn*
Case No. 06-17042. . . . . .90a-91a

Ninth Circuit Memorandum Decision
Johnson v. *Finn*
Case No. 06-17042. . . . . .92a-96a

District Court Order
for Release of Person in Custody
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 97a-98a

District Court Order
and Writ of Habeas Corpus Ad Testificandum
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 99a-100a

District Court Order
Releasing Petitioner Subject to Conditions of Release
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 101a-105a

District Court Order Directing Parties to Appear
to Set Conditions of Release
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 106a

District Court Judgment
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 107a

District Court Order
Adopting Findings and Recommendations
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 108a-109a

District Court Order
and Findings and Recommendations
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 110a-115a

District Court Order
Referring Matter to Magistrate Judge
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 116a-119a

District Court Order
and Findings and Recommendations
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 120a-144a

California Supreme Court Order
Denying Petition
In re Johnson
Case No. S119859 . . . . . 145a

California Court of Appeal Order
Denying Habeas Corpus Relief
In re Johnson
Case No. D041899. . . . . 146a-148a

California Superior Court Order
Denying Habeas Corpus Relief
In re Johnson
Case No. CRN 487001. . . . . 149a-155a

Governor's Parole Denial. 156a-161a

VOLUME II OF II

SNEED CASE

Ninth Circuit Mandate
Sneed v. *A.P. Kane*
Case No. 07-15061. . . . . 162a

Ninth Circuit Order
Denying Petition for Rehearing/En Banc
Sneed v. *A.P. Kane*
Case No. 07-15061. . . . . 163a

Ninth Circuit Memorandum
Sneed v. *A.P. Kane*
Case No. 07-15061. . . . . 164a-165a

District Court Judgment
Sneed v. *A.P. Kane*
Case No. C 05-4109 SI (pr). 166a

District Court Order Denying Petition
Sneed v. *A.P. Kane*
Case No. C 05-4109 SI (pr) 167a-182a

California Supreme Court Order
Denying Petition
In re Anthony Sneed
Case No. S123452. . . . . .183a

Governor's Parole Denial 184a-190a

MOSLEY CASE

Ninth Circuit Order
Staying Mandate
Mosley v. *Oroski*
Case No. 08-15327, 08-15328. . . . . 191a-192a

Ninth Circuit Order
Remanding to District Court Mosley's Motion
for Immediate Release
Mosley v. *Oroski*
Case No. 08-15327, 08-15328. . . . . 193a-194a

Ninth Circuit
Memorandum Decision
Mosley v. *Oroski*
Case No. 08-15327, 08-15328. . . . . 195a-199a

District Court Judgment
Mosley v. *Oroski*
Case No. C05-4260 TEH. 200a-201a

District Court Order
Mosley v. *Oroski*
Case No. C05-4260 TEH. 202a-217a

California Supreme Court Order
Denying Petition for Review
In re Ron Mosley
Case No. S135255. . . . . .218a

California Court of Appeal Order
Denying Habeas Corpus Relief
In re Ron Mosley
Case No. A110503 . . . . . .219a

California Superior Court Order
Denying Petition
In re Ron Mosley
Case No. SC141041A 220a-221a

Governor's Parole Denial. 222a-227a

District Court Order
Granting Bail
Mosley v. *Oroski*
Case No. C05-4260 TEH. 228a-238a

SLATER CASE

Ninth Circuit Mandate
Slater v. *Sullivan, et al.*
Case No. 09-17784 . . . . . .239a

Ninth Circuit Memorandum Decision
Slater v. *Sullivan, et al.*
Case No. 09-17784. . . . . .240a-244a

Ninth Circuit Order Denying Stay
Slater v. *Sullivan, et al.*
Case No. 09-17784 . . . . . .245a

District Court Order Denying Stay
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 246a-255a

District Court Judgment
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 256a

District Court Order Adopting Findings and Recommendations
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 257a-269a

District Court Findings and Recommendations
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 270a-297a

California Supreme Court Order Denying Petition for Review
In re Slater
Case No. S156366. . . . . .298a

California Court of Appeal Order Denying Habeas Corpus Relief
In re Slater
Case No. B201547 . . . . . .299a

California Superior Court Order
Denying Habeas Corpus Relief
In re Slater
Case No. BH004061. . . . . 300a-302a

Board of Prison Terms Hearing Transcript
Decision Pages. 303a-309a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MOLLY C. DWYER,
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U.S. COURT OF
APPEALS

JOHN H. PIRTLE,

Petitioner - Appellee,

v.

CALIFORNIA BOARD OF PRISON TERMS; D. L. RUNNELS; ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondent- Appellant.

No. 07-16097

D.C.No.CV-04-00518-FCD/KJM

OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding
Argued and Submitted March 12, 2008
San Francisco, California
Submission Vacated December 3, 2008
Resubmitted May 28, 2010

Filed

Before: REINHARDT, NOONAN, and FISHER, Circuit Judges.

Opinion by Judge Reinhardt

California state prisoner John H. Pirtle was given a parole date in 1990, but in 1994, the California Board of Prison Terms rescinded his parole. After that, the Board denied Pirtle parole three other times prior to a denial in 2002.[1] Pirtle filed a petition for a writ of habeas corpus, asserting that the Board's 2002 denial of parole violated his constitutional right to due process. The state courts denied his petition, but the district court granted the writ. The State appeals. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

I.

In 1980, Pirtle was convicted of second-degree murder for killing his wife. He was sentenced to a term of seventeen years to life in prison. Ten years later, after a hearing, the Board determined that Pirtle was "suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." The Board found that Pirtle committed the crime "as a result of significant stress in his life," that he showed remorse, and that he accepted responsibility for his actions. It also found that Pirtle had a stable social history prior to his marriage to the victim, had no juvenile or adult convictions for violent offenses, had performed well in his prison job assignments, had matured since his crime, had received positive psychiatric reports, and had developed realistic plans for his parole. The Board set his release date for December 30, 1994. In March 1994, however, the Board rescinded Pirtle's parole. It found that the previous panel had not given

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1 On July 1, 2005, the California Board of Parole Hearings replaced the Board of Prison Terms. Cal. Penal Code § 5075(a). The two entities perform the same function, and we use the term "Board" to refer to both.

sufficient weight to the gravity of the original offense, the fact that he had been carrying a concealed weapon, or his history of alcohol abuse, crime, and domestic violence. The Board denied Pirtle's parole again in 1995, 1996, 1998, and 2002. Each time, the Board relied on the circumstances of Pirtle's crime, his history of criminal conduct, and his failure to attend a substance abuse program. The Board's 2002 denial of parole is the subject of this appeal.

At the 2002 hearing, the Board considered two descriptions of Pirtle's crime. The first was from the 1990 Board report following Pirtle's first parole hearing, at which he was deemed suitable for parole. That report was read into the record at the hearing and was transcribed as follows:

> On March the 8th, 1980 at approximately 1:17 a.m., the Gridley Police Department was notified of the shooting at The Moose Lodge. Upon arrival at the scene, the responding police officers observed the victim, Diane Pirtle, lying on the floor with a gunshot wound to her upper chest area. The victim was transported to the memorial hospital where she was pronounced dead at approximately 1:20 a.m. The prisoner, John Pirtle, arrived at the police department and informed personnel on duty that he had just shot his wife at the Moose Lodge. He then produced a small pistol and placed it on the counter. Pirtle then was taken into custody, and when informed that the victim, his wife, had died, responded by stating, okay. An autopsy performed on the victim revealed that she had died as a result of a single 25 caliber bullet entering her upper chest and

> penetrating her heart and liver. Witnesses relate that at approximately 10:30 p.m. on March 7, 1980, the defendant – the prisoner had entered the Moose Lodge, approached his wife, slapped her in the face and then left. At approximately 1:00 a.m. on March 8, 1980, the prisoner returned to the Moose Lodge, ordered a drink at the bar and paced around the bar area while the victim and another man danced to the music. When the music stopped, the prisoner walked up to the victim, placed his arms around her and shot her in the chest. The prisoner then exited the building.

(name spelling and reading errors omitted).

Next, the Board read into the record Pirtle's own account of the crime that he gave in 1990. It was transcribed as follows:

> The prisoner relates that on the day prior to the killing, he and his wife discussed their marital problems and decided to give their marriage one more try. The following day his wife came to pick him up at the bar where he was bartending. She told him that she wanted to stay in town and drink and he could go home if he wished. The prisoner stated that he left his wife and proceeded home in order to give money to his children for dinner. He then returned to town, had several drinks and went to the Moose Lodge where he observed his wife with another man. The prisoner indicated that this upset him to the point that he slapped his wife before going uptown to continue drinking. He then went

to a nearby town where he continued to drink before returning to Gridley. The prisoner stated that on the way back he was stopped by a police officer who told him to go home, which he did. After sleeping for an hour, the prisoner stated he woke up and found his wife was still not home. He returned to look for her. Not finding her at several bars, he went to the Moose Lodge where he found her dancing with another man. He waited for the music to end before approaching the victim and asked her if she was ready to go home. The prisoner indicated that his wife told him that she was not going to go home with him, but that she was going home with Ron, her dancing partner. The prisoner stated that the next thing he recalled was a loud bang and seeing his wife fall to the floor. He then found himself over the gun and became very confused. He walked out of the bar and drove to the police station. The prisoner indicated his remorse for the killing of his wife by stating that he cared for her a great deal. He further indicated that he had no predisposition to murder her. He states that he had a habit of carrying a loaded weapon with him most of the time for protection. He had been drinking prior to this shooting but does not feel that he was inebriated at the time of the shooting. The prisoner gave no explanation or motive for his action other than his wife rebuffing him for someone else.

In addition to the circumstances of the commitment offense, the Board considered Pirtle's prior criminal history. He had no juvenile arrest record, [2] and as an adult he had misdemeanor convictions for drunk driving, disturbing the peace, disorderly conduct, and escape from the county honor farm. He also had a felony drunk driving conviction.

The Board also discussed Pirtle's tumultuous marriage to the victim. Both Pirtle and the victim were alcoholics and they fought frequently. On at least six occasions, the police were called to break up drunken fights between the Pirtles.

Finally, the Board questioned Pirtle about his history of alcohol abuse. Pirtle was asked why he stopped attending Alcoholics Anonymous ("AA") meetings in prison. He told them that attendance at AA meetings was a condition of his original parole date, but when his date was revoked, he stopped attending because he does not believe in a higher power, which is an important aspect of AA. At a 1996 hearing, the Board asked him why he did not attend AA meetings and he replied, "if you don't believe in a higher power you cannot do the 12 steps, and I don't believe in a higher power." The 2002 panel was aware of Pirtle's reasons for not attending AA.

At the conclusion of the 2002 hearing, the Board found that Pirtle was "not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison."

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2 Although the Board stated that Pirtle had no juvenile arrest record, he reported to the Board that when he was fourteen years old, he spent seven days in juvenile hall after being accused of forging a check on his uncle's bank account. He was then put on probation. ER 24.

It found that his crime was committed in "an especially cruel and callous manner," and that it was "carried out in a dispassionate calculated manner." Additionally, the Board found that "[t]he motive for the crime was inexplicable or very trivial in relationship to the offense."

The Board also found that Pirtle had an "escalating pattern of criminal behavior" and that he had "failed to profit from society's previous attempts to correct his criminality." It noted his unstable social history, including his alcohol abuse and the allegations that he was abusive toward his wife. The Board found that he needed to upgrade vocationally, participate in therapy or a self-help group to learn how to manage anger and stress, and take part in a substance abuse program. The Board emphasized its particular concern that Pirtle had not "made a lifelong commitment to a substance abuse program."

On January 27, 2003, Pirtle filed a petition for a writ of habeas corpus in the Butte County Superior Court, asserting that the Board's denial of parole violated his constitutional right to due process because the decision was not supported by any evidence. The state court issued a *Waltreus* denial of his petition, which is a summary dismissal issued when a petitioner raises claims in a habeas corpus petition that were already decided on direct appeal. *See In re Waltreus*, 397 P.2d 1001, 1005 (Cal. 1965). The *Waltreus* denial was in error, because the question whether the Board denied Pirtle parole in violation of his constitutional right to due process was not and could not have been decided on direct appeal from his original conviction. The California appellate courts issued summary denials of Pirtle's subsequent appeals.

Pirtle then filed a habeas corpus petition in district court. A magistrate judge issued a report and recommended that the writ be granted because the Board's decision was not supported by any evidence. The district court adopted the magistrate judge's findings and recommendations in full, granted the writ, and ordered the Board to set a parole date for Pirtle within 30 days. The State timely appealed.

II.

The parties dispute the proper scope of review in this case. The State contends that we must apply the deferential standard set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under the relevant portion of AEDPA, federal courts may not grant a writ of habeas corpus on

> any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Pirtle argues that AEDPA's deferential standard does not apply to his claim because it was not adjudicated on the merits by a state court. Under the "look through" doctrine, in order to determine whether the state courts ever reached the merits of a federal claim, we must "look through" unexplained state court decisions, such as summary denials, to

the last reasoned state court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 802, 806 (1991); *see also Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir. 2009). Here, the only reasoned state court decision was a *Waltreus* denial, which has been held by the Supreme Court to be neither a procedural denial nor a denial on the merits. *Ylst*, 501 U.S. at 805-06; *see also Hill v. Roe*, 321 F.3d 787, 789 (9th Cir. 2003). Because the state courts did not reach the merits of Pirtle's federal claim, "there is no state court decision on this issue to which to accord [AEDPA] deference." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). Where, as here, "it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo." *Id.*

III.

"California's parole scheme gives rise to a cognizable liberty interest in release on parole." *McQuillon v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002). That liberty interest encompasses the state-created requirement that a parole decision must be supported by "some evidence" of current dangerousness. *Hayward v. Marshall*, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc); *see also Pearson v. Muntz*, 606 F.3d 606, 608-09 (9th Cir. 2010).

Our "some evidence" analysis is shaped by the state regulatory, statutory, and constitutional law that governs parole suitability determinations in California. *See Hayward*, 603 F.3d at 561-62. California law requires the Board to grant an eligible inmate a parole date unless the Board determines that "consideration of the public safety requires a more lengthy period of incarceration for this individual." Cal. Penal Code § 3041(b). According to the California Supreme Court, "public safety" is the

"overriding statutory concern" of the state's parole scheme. *In re Dannenberg*, 104 P.3d 783, 795 (Cal. 2005); *accord In re Lawrence*, 190 P.3d 535 (Cal. 2008); *In re Shaputis*, 190 P.3d 573 (Cal. 2008). The emphasis on public safety is also evident in California's parole regulations, which provide that a prisoner will be found unsuitable for parole if "in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Cal. Code Regs., tit. 15, § 2402(a). In short, "'some evidence' of future dangerousness is indeed a state sine qua non for denial of parole in California." *Hayward*, 603 F.3d at 562.

To assist in determining who may pose an unreasonable risk of danger, the California parole regulations identify circumstances that "tend[] to indicate unsuitability for release." Cal. Code Regs., tit. 15, § 2402(c). These circumstances include the aggravated nature of the commitment offense, a previous record of violence, an unstable social history, sadistic sexual offenses, a history of severe mental problems related to the offense, and serious misconduct in jail. *Id.* The regulations also identify circumstances that "tend to show suitability" for parole, including the lack of a juvenile record, a stable social history, signs of remorse, significant stress as a motivation for the crime, lack of criminal history, realistic plans for the future, and good institutional behavior. *Id.* § 2402(d).

While the regulatory factors are designed to guide the Board's decision, the ultimate question of parole suitability remains whether the inmate poses a threat to public safety. "There must be 'some evidence' of such a threat," *Hayward*, 603 F.3d at 562, and not merely evidence that supports one or more of the Board's subsidiary findings. In

particular, the Board may not rely solely on the circumstances of a commitment offense, because "[t]he prisoner's aggravated offense does not establish current dangerousness 'unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state' supports the inference of dangerousness." *Id.* (quoting *Lawrence*, 190 P.3d at 555). Accordingly, under California's parole system and the constitutional requirements of due process, we must determine whether the record contains "some evidence" that Pirtle poses a current threat to public safety.

Here, the Board's stated reasons for denying Pirtle parole can be divided into three categories: 1) findings about the circumstances of the commitment offense; 2) findings about Pirtle's background and history; and 3) findings about Pirtle's conduct while incarcerated. The most substantial of the Board's findings relate to Pirtle's crime. First, the Board found that the offense was carried out in an "especially cruel" manner and demonstrated "an exceptionally callous disregard for human suffering." All of the evidence in the record, however, actually supports the opposite conclusion. As the district court correctly determined, Pirtle did not torment or terrorize his wife on the night of the crime. Although he slapped her early in the evening, she continued to drink and dance at the bar, clearly not traumatized by the experience. Moreover, the record contains no evidence regarding particular suffering as a result of the gunshot wound. The Board identified no characteristic of the shooting that, on a comparative basis, made the action "especially cruel" or "exceptionally callous."

Next, the Board found that the offense was committed in a "dispassionate calculated manner." This finding appears to be based on the Board's speculation that, after Pirtle's confrontation with his wife earlier in the evening, "he retrieved a weapon" from his home. Presumably, this suggested to the Board that Pirtle returned to the bar with the "dispassionate" and "calculated" intention or at least consideration of killing his wife. No evidence in the record supports the Board's conjecture. To the contrary, Pirtle testified at the hearing that he often carried a gun so as to have it available for self-protection while performing his job as a bartender. At the 1994 parole hearing, the transcript of which the panel reviewed before the hearing, he testified that on the night of the murder, he had the gun with him the whole time, including during the first confrontation when he slapped his wife at the bar. According to Pirtle, he decided to return to the bar only after he woke to find that his wife was not home yet. The event that triggered the murder was when he asked her if she was ready to go home and she told him that she was going home with another man, her dance partner.[3] He shot her immediately following that public humiliation. Nothing in this account – or anywhere else in the record – suggests that Pirtle spent time coolly planning the crime in advance. Thus, no evidence in the record supports the Board's finding that the offense was dispassionate and calculated.

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3 The State agrees that Pirtle shot his wife only after she told him that she was going home with another man. Indeed, the State asserts that the facts of the commitment offense are "undisputed."

The Board also found that the motive for the crime was inexplicable or very trivial in relationship to the offense. Nothing in the record supports this characterization either. Pirtle shot his wife in a highly-charged, emotional moment. The day after the couple agreed to try to save their failing marriage, Pirtle watched his intoxicated wife dance with another man at a bar. When Pirtle tried to take her home, she refused and instead declared that she was going home with the other man. This public moment of rejection, betrayal, and infidelity created a motive that was hardly trivial or inexplicable. To hold otherwise would be to disregard the history of human nature. No motive is more frequently recorded in literature and in song than jealousy and betrayal.[4] A wife who tells her husband that she is "going home" with another man provides that traditional motive, even if the act of infidelity is not yet consummated, but only clearly contemplated. Accordingly, as with the Board's other findings with regard to the crime, no evidence in the record supports the finding that Pirtle committed the offense for trivial or inexplicable reasons.

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4 In some instances the motive has a basis in truth:

> Frankie and Johnny were lovers . . . .
> She shot her man, 'cause he done her wrong.

In other instances, however, it does not, such as in Othello's murder of Desdemona after being deceived into believing her unfaithful:

> Yet I'll not shed her blood; Nor scar that whiter skin of hers than snow, And smooth as monumental alabaster. Yet she must die, else she'll betray more men. Put out the light, and then put out the light . . . .William Shakespeare, Othello act 5, sc 2.

The Board's next set of findings had to do with Pirtle's background. The Board found that Pirtle had demonstrated an "escalating pattern of criminal behavior" and "failed to profit from society's previous attempts to correct his criminality." The district court correctly found that Pirtle's handful of minor misdemeanors and one felony drunk driving offense can hardly be described as an "escalating pattern of criminal behavior." Similarly, no evidence supports the Board's finding that Pirtle failed to profit from society's previous attempts to rehabilitate him. First, although the Board stated that Pirtle "failed previous grants of probation," the record contains no evidence of any such failure.[5] Moreover, although he served two brief jail terms for non-violent, alcohol-related offenses before he committed the murder, this does not serve as evidence that Pirtle "cannot be counted on to avoid criminality," as the Board asserted. To hold otherwise would be to create a per se rule that any inmate who previously spent time in jail for any crime, no matter how minor, "cannot be counted on to avoid criminality" and is therefore unsuitable for parole. Such a rule would actually violate the parole regulations, which consider a lack of "any significant history of violent crime" to be an indicator of suitability for parole. Cal. Code Regs., tit. 15, § 2402(d)(6).

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5 Indeed, there is no evidence that Pirtle was ever put on probation as an adult. The only evidence in the record with regard to probation of any kind comes from Pirtle's own account of an incident that occurred when he was fourteen years old. According to Pirtle, he was accused of forging a check on his uncle's bank account, and as a result he was placed in juvenile hall for seven days and then put on probation. The record contains no evidence that he failed to complete juvenile probation successfully.

The Board next found that Pirtle had an unstable social history based principally on alcohol, and additionally on an "escalating pattern of domestic encounters" in his relationship with the victim. A tumultuous relationship with a wife who engaged in multiple extra-marital affairs does not support a finding of an unstable social history, much less does it provide "some evidence" that, thirty years later, Pirtle poses a danger to public safety. The transcript of the 2002 parole hearing makes clear, however, that the Board found Pirtle's history of alcoholism to be the most troubling aspect of the record before it and the principal basis of its conclusion regarding an unstable social history. Pirtle's episodic abuse of alcohol played a significant role in his prior convictions as well as in the commitment offense. Recognizing the relationship between Pirtle's prior alcohol abuse and his commitment offense, the Board has repeatedly advised Pirtle that he should attend AA meetings. Pirtle regularly attended such meetings for four years after he was given a parole date in 1990, because doing so was a condition of that original order, but he stopped when the parole date was revoked. Pirtle has explained to the Board that he is an atheist, and as such, he objects to AA's religious content and its emphasis on a higher power.[6] He has also explained to the Board that he is willing to attend a secular substance abuse program,

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6 We note that, although the issue is not before us, it would likely violate Pirtle's First Amendment rights to require him to attend AA as a condition of parole. *See Inouye v. Kemna*, 504 F.3d 705, 712-715 (9th Cir. 2007) (holding that requiring a parolee to attend AA or Narcotics Anonymous violates the First Amendment). The California Department of Corrections is, of course, free to impose other parole conditions relating to alcohol, the substance of which we do not presume to consider here.

and at his 2002 hearing, he provided the Board with a list of such programs in the area of Northern California in which he could participate if he were released. Pirtle had been unable to attend secular substance abuse programs in prison, however, because according to his uncontroverted testimony, no such programs were available.[7] His failure to attend a program that is not available has no probative value, and thus cannot support the Board's decision in any way.

Notwithstanding his unwillingness to attend AA because of his religious beliefs, Pirtle has been consistently forthright with the Board about his alcohol abuse. He has repeatedly expressed his commitment to abstain from alcohol, both to the Board and to prison psychologists. Pirtle's

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7 At his 1996 hearing, the Board informed Pirtle that there was a new secular alternative program to AA at the prison. Two years later, Pirtle testified that he signed up for that program, but he was subsequently transferred to a new facility that did not offer the secular program.

At oral argument, the State contended that Pirtle could have attended self-help programs or engaged in self-study. The record shows that he did attend two self-help programs – Breaking Barriers and Alternatives to Violence. Moreover, the record contains no evidence that self-study was available to Pirtle as a treatment for substance abuse, or that self-study was suggested by any of the psychologists who regularly assessed Pirtle and recommended that he attend secular AA programs upon release. We can only speculate about the nature of the self-study program to which the State referred at oral argument, and speculation does not, of course, constitute evidence. What does constitute evidence is Pirtle's abstention from alcohol throughout the twenty-two years prior to his parole hearing, as well as his impeccable disciplinary record in prison, both of which are highly probative of his attitude towards alcohol and his capacity for self-discipline.

psychological assessments report that he has a history of episodic alcohol abuse, and that it is now in remission. The assessments also state that Pirtle has a great deal of insight about his problem with alcohol and its role in his crimes, and they note that he is committed to sobriety.

Pirtle's attitude about alcohol was demonstrated most colorfully at one parole hearing in which he stated: "I mean I wouldn't stick my hand in a jar of rattlesnakes – drinking would be paramount to the same thing." Consistent with the self-awareness that he has demonstrated and that his psychologists have observed, Pirtle had not consumed any alcohol during the twenty-two years of incarceration that preceded his 2002 parole hearing. Because there is no evidence that Pirtle will be unable or unwilling to manage his alcohol problem effectively upon release, as he has already done for more than two decades, we agree with the district court that "the record does not support the panel's determination that petitioner's abuse of alcohol up to 1980 rendered him dangerous in 2002."

The Board's remaining two reasons for denying parole concern Pirtle's rehabilitation program. First, the Board found that Pirtle "failed to upgrade vocationally." It is true that he had not recently completed any vocational training programs at the time of the 2002 hearing, but as the district court noted, he "maintained steady employment while in the institution, building an employment record characterized as 'exceptional.'" Additionally, the record demonstrates that Pirtle already possessed several job skills, including that of farm equipment operator, mechanic, and welder, and that he had an

offer of employment upon release doing ranch work for sixty hours per week.[8] In light of his existing vocational skills and post-release employment offer, there is no logical connection between Pirtle's failure to take vocational classes in prison and the conclusion that he would pose a threat to public safety upon release. Accordingly, the Board's finding that Pirtle failed to upgrade vocationally does not constitute evidence of current dangerousness.

Finally, the Board found that Pirtle requires additional therapy or self-help in order to learn how to cope with anger and stress.[9] There is no evidence, however, that as of 2002 Pirtle had a difficult time coping with either anger or stress. During his twenty-two years of incarceration, he received no serious disciplinary infractions, which demonstrates that he knows how to "cope with stress in a nondestructive manner." His most recent psychological evaluation notes that "[w]hile admitting that he feels helpless from time to time, he remains cooperative with prisoner programming and continues his impeccable record with no [serious disciplinary violations] at any time." Far from suggesting that Pirtle requires additional therapy in order to become non-dangerous, his psychological reports are consistently positive. In fact, when the Board first recommended that Pirtle seek psychotherapy in 1995, he consulted a psychologist who reported that:

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[8] We note that the parole regulations list "realistic plans for release" as a factor that demonstrates suitability for parole. Cal. Code Regs. tit. 15, § 2402(d)(8).

9 Oddly enough, in the same paragraph, the Board commended Pirtle for completing an Alternatives to Violence program and acknowledged that his psychiatric report was positive.

> Mr. Pirtle has not and does not manifest any characteristic of psychiatric concern. Having evaluated him myself, as well as having observed him at his place of work for three or more years, I am in accord with the past unanimity of clinical opinion. To involve this man in any type of psychotherapy . . . is a needless and profligate waste of professional effort more wisely extended to emotionally unstable prisoners, or to those who pose a likely danger to society. Mr. Pirtle is neither unstable [n]or potentially dangerous.

The record contains no evidence that contradicts this professional assessment, or that otherwise supports the Board's finding that Pirtle needs additional programming in order to learn how to cope with anger and stress.

In sum, there is no evidence in the record to support the Board's finding that Pirtle poses a current threat to public safety. The Board's stated reasons for the denial of parole either lacked evidentiary support, had no rational relationship to Pirtle's current dangerousness or both. Accordingly, we affirm the district court's decision to grant the writ of habeas corpus.

IV.

Upon granting the writ, the district court ordered the Board to set a parole date for Pirtle within thirty days. The State argues that the district court's remedy was improper, and that the appropriate remedy would be to remand the case to the Board with instructions to hold another hearing. There is no merit to this argument. Federal courts have the latitude to resolve a habeas corpus petition "as law

and justice require." 28 U.S.C. § 2243. Ordering the release of a prisoner is well within the range of remedies available to federal habeas courts. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him." *Fay v. Noia*, 372 U.S. 391, 430-31 (1963), overruled on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1977). Accordingly, we hold that the district court's remedy was proper.[10] Moreover, given the extraordinary passage of time since the district court's order, it may wish to order the Board not simply to set the parole date within thirty days but to set a date for parole that would ensure Pirtle's release on parole within thirty days.

V.

For the foregoing reasons, we hold that the Board's decision to deny Pirtle parole was not supported by "some evidence" of current dangerousness and thus violated his right to due process. We further hold that the district court's remedy of ordering the Board to set a parole date within thirty days was proper. We therefore affirm the decision of the district court.

AFFIRMED.

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[10] By the same token, the Governor's power to review parole decisions under California Penal Code § 3041.1 does not compel a delay in setting Pirtle's release date. Because the scope of the Governor's review is limited to the materials presented to the Board, our finding that the Board's decision was not supported by "some evidence" would render "a remand to the Governor in this case . . . an idle act." *In re Smith*, 109 Cal. App. 4th 489, 507 (2003); *see also McQuillion v. Duncan*, 342 F.3d 1012, 1015-16 (9th Cir. 2003).

Court of Appeal, Third Appellate District, No.
C044757
S119114

Supreme Court
FILED
DEC 10 2003
Frederick K.
Ohlrich Clerk

DEPUTY

IN THE SUPREME COURT OF CALIFORNIA
En Banc

In re JOHN HERMAN PIRTLE on Habeas Corpus

Petition for review DENIED.

GEORGE, C.J.
Chief Justice

COURT OF APPEAL FOR THE STATE OF
CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

FILED
Sept. 4, 2003
COURT OF
APPEAL-THIRD
DISTRICT
DEENA C.
FAWCETT
By_____Deputy

In re JOHN HERMAN PIRTLE on Habeas Corpus.

C044757
Sacramento County
No.

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated: September 4, 2003

SCOTLAND, P.J.

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cc: See Mailing List

SUPERIOR COURT OF CALIFORNIA

COUNTY OF BUTTE

FILED
MAY 23 2003

By /s/ Deputy

In the Matter of the Application of John H. Pirtle	)	Case No. 71619
For Writ of Habeas Corpus	)	Order Denying Petition or Transferring Petition

The Petition for Writ of Habeas Corpus filed 1/27/03 has been read and considered.

____(1) The Writ of Habeas Corpus is denied for the following reason:

___The vague, unsupported, and conclusionary allegations contained in the Petition are insufficient to allow for intelligent consideration of the issues which petitioner had attempted to raise. (In re: Swain (1949) 34 Cal.2D 300; In re Patton 1918) 178 Cal. 629).

___Petitioner has failed to establish a prima facie case for relief on habeas corpus (In re Lawler 23 Cal. 3rd 190,194).

___Petitioner is required to exhaust administrative remedies before seeking relief in the courts. (In re Muszalski (1975) 52 Cal. App. 3D 500).

___Petitioner has available remedies at law that have not been exhausted.

___Because it has not been adequately established in the moving papers that there has been a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected.

___The court will not consider newly presented grounds for relief that were known, or should have been known, to petitioner at the time of a prior writ previously denied (In re Drew 188 Cal. 717, 722 and In re Clark 5 Cal 4th 750, 768).

___Undue delay. Petitioner is required to explain and justify any significant delay in seeking habeas corpus relief (In re Clark 5 Cal. 4th 750,764).

___Failure to raise issue on appeal. In absence of special circumstances constituting an excuse for failure to employ that remedy, a writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction (In re Walker 10 Cal. 3rd 764,773 In re Clark 5 Cal. 4th 750,764.

✓___Issues resolved on appeal cannot be reconsidered on habeas corpus. (See In re Waltreus (1965) 62 Cal.2d 218,225.)

___The circumstances described to support the request for issuance of the writ have changed, thereby, rendering the petition moot.

___Other

_____(2) This Matter is transferred to the Superior Court of _____ County. The Court finds that to be the appropriate jurisdiction for the above-mentioned writ

in that the petitioner is confined in _____ County or the circumstances upon which this writ is based arise out of _____ County (see Griggs v. Superior Court, 16 Cal. 3D 341).

Date 5/23/03

/s/ signature

Superior Court Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JULY 12 2010
Molly C Dwyer, Clerk
U.S Court Of Appeals

JOHN H. PIRTLE,
Petitioner - Appellee,

v.

CALIFORNIA BOARD OF PRISON TERMS; D. L. RUNNELS; ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondent - Appellant.

No. 07-16097

D.C.No.CV-04-00518-FCD/KJM

MANDATE

The judgment of this Court, entered July 12, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT
Molly C. Dwyer
Clerk of Court
Lee-Ann Collins
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Oct 20 2010

MOLLY C DWYER,
CLERK
U S COURT OF
APPEALS

JOHN HERMAN PIRTLE, Petitioner - Appellee, vs. CALIFORNIA BOARD OF PRISON TERMS, et al., Respondent.	No. 07-16097 D.C. No. CV-04-00518 FCD/KJM Eastern District of California, Sacramento ORDER

Before: REINHARDT, NOONAN and FISHER, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.

SUBSEQUENT PAROLE CONSIDERATION
HEARING
STATE OF CALIFORNIA
BOARD OF PRISON TERMS

In the matter of the Life Term Parole consideration Hearing of: JOHN PIRTLE	CDC Number C-20936

COPY
RECORDS

THIS IS A CERTIFIED
COPY OF DOCUMENT IN
FILE

/s signature
Litigation Assistant
Folsom State Prison
DATE 10-1 03

FOLSOM STATE PRISON
REPRESA, CALIFORNIA
MARCH 25, 2002
2:40 P.M.

PANEL PRESENT:
BOOKER WELCH, Presiding Commissioner
JOHN WEAVER, Deputy Commissioner
OTHERS PRESENT:
JOHN PIRTLE, Inmate
RHONDA SKIPPER-DOTTA, Attorney for Inmate
MIKE RAMSEY, DISTRICT ATTORNEY

CORRECTIONS TO THE DECISION HAVE BEEN MADE

No
__X__ Yes See Errata Sheet

Debra M. Sevey, Capitol Electronic Reporting

CALIFORNIA BOARD OF, PRISON TERMS
DECISION

DEPUTY COMMISSIONER WEAVER: You're on record, Sir.

PRESIDING COMMISSIONER WELCH: Okay. The Panel reviewed all information received from the public and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society or a threat, to public safety if released from prison. The offense was carried out in an especially cruel and callous manner. The offense was carried out in a dispassionate calculated manner. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. The motive for the crime was inexplicable or very trivial in relationship to the offense. The conclusion was drawn from the statement of Facts where on March 8, 1980 at approximately 1:17 a.m. the Gridley, G-R-I-D-L-E-Y, Police Department was notified of a shooting at The Moose Lodge. Upon arrival, they found the victim, Diane, the prisoner's wife,

DEPUTY COMMISSIONER WEAVER: Pardon me?

ATTORNEY SKIPPER-DOTTA: Pirtle.

PRESIDING COMMISSIONER WELCH: Pirtle, P-I-R-T-L-E, was lying on the floor with a gunshot wound to her upper chest area. The circumstances around the shooting is that the prisoner went into The Moose Lodge, and observed his wife dancing with another person. He went into (inaudible). He walked up and put his arms around her and used a 25 caliber weapon to shoot her. He placed it to her chest and shot her in the chest, and that penetrated her heart and her liver, and she succumbed to her wounds. The prisoner has an escalating pattern of criminal behavior. He's failed previous grants of probation and cannot be counted upon to avoid criminality. He's failed previous -- He's failed to profit from society's previous attempts to correct his criminality. Such attempts include adult probation and county jail. The prisoner's unstable social history would primarily be centered around his alcohol abuse, his abuse of alcohol. And that's pretty much where we would find the unstable social history. His prior criminality includes arrests for disorderly conduct, escape from a county farm, speed contest and a DWI, driving while under the influence. Also, it's noted that an unstable social history, I guess we should also note the prisoner's domestic encounters. His escalating

encounters. His escalating pattern of domestic encounters where the police department was frequently called because of domestic allegations that the prisoner was being abusive to his wife, for fights with the prisoner and his wife. So, we had an escalating pattern of domestic violence conduct. The prisoner has failed to upgrade vocationally as

previously recommended by other Panels. The prisoner got a good psychiatric report. The psychiatric report by Dr. Giantonio was a supportive report. The prisoner's parole plans, the prisoner has made parole plans. They could use some tightening up, but overall, the prisoner has made some effort to develop parole plans (inaudible) has been in prison for over 20 years. So, he did put some effort into that. The Hearing Panel notes that in response to Penal Code 3042 notices indicate an opposition to a finding of parole suitability. And specifically, the Deputy District Attorney from Butte County or are you the District Attorney?

DISTRICT ATTORNEY RAMSEY: The District Attorney.

PRESIDING COMMISSIONER WELCH: Oh, I'm sorry. The District Attorney, excuse me, of Butte County spoke in opposition of a finding of suitability

at this time. The Panel makes the following findings. The prisoner needs to be able to face, discuss, understand and cope with stress in a non-destructive manner. Until progress is made, the prisoner continues to be unpredictable and a threat to others. Nevertheless, there are some things that the prisoner should be commended for. The prisoner did take an Alternatives to Violence program. He gets good work reports. However, these positive aspects of his behavior does not outweigh the factors -- And he got a good psychiatric report from the doctor. However, these positive aspects of his behavior does not outweigh the factors of unsuitability. Parole is denied for two years. In a separate decision, the Hearing Panel finds that it's not reasonable to expect that

parole would be granted at a hearing during the following two years. Specific reasons for these findings are as follows. The prisoner committed the crime in an especially cruel manner. His wife was at a Moose Lodge. She was dancing. The prisoner went there previously and walked and slapped his wife. He left. He had a lot of time to think about it. He encountered a police who told him to go home and get some sleep. He went home to get some sleep, and he retrieved, a weapon.

JOHN PIRTLE C-20936 DECISION PAGE 4 3/25/02

He came back to the lodge, and he shot his wife down on the dance floor. The offense was carried out in a dispassionate and calculated manner. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. The motive for the crime was inexplicable or very trivial in relationship to the offense. The prisoner had a history of unstable or tumultuous relationships with others. He had been married three times, and his last marriage was to be characterized as turbulent. The prisoner has not completed necessary programming, which is essential to his adjustment, and he needs additional time to gain such programming. He's not participated in the vocational programs that's available at the different institutions. He's failed to participate in substance abuse programming. Now, let it be clear that the Board does not advocate anyone type of substance abuse program over another one, that is a faith based program over a non-faith based program. But, certainly, with the prisoner's history of substance abuse and alcohol use, he should be involved in some kind of substance abuse program, and it should not

only be a substance abuse program while incarcerated, but it should be a commitment. In

JOHN PIRTLE C-20936 DECISION PAGE 5 3/25/02

your parole plans, sir, there should be (inaudible) substance abuse planning that you're committed to being involved in some type of substance abuse program, especially with your prior record (inaudible) where people were injured. So, you have to get involved in some type of substance abuse program. Therefore, the Panel recommends that you remain disciplinary free, that if available you upgrade vocationally, and that you participate in some type of substance abuse program or self-help program. For that matter, any other type of self-help program that deal with anger management, stress management, those types of things Mr. Pirtle, it seems like you want to do it your way in terms of getting a parole date. There is -- We can't just take your word that you're not going to get involved in any type of substance abuse once you get out. You've been in prison. The Boards have told you to participate in vocational kinds of programs, and during our deliberation we talked about whether you would get involved and try to become a bartender or not. But, sir, as long as you've been in prison you've had the opportunity to get a vocation, certainly as long as you've been in prison you've had the opportunity to get involved in some type of substance abuse program. And with, your record, you must realize

JOHN PIRTLE C-20936 DECISION PAGE 6 3/25/02

that there is an awesome responsibility for this Board to try to determine a parole date for you when

you have not made a lifelong commitment to a substance abuse program. It's more -- It's too much of a risk to The People of Butte County and The People of California to sit here and take your word because when you went to that other (inaudible) for substance abuse problem, you didn't stay there. You escaped. And you went out and you still got involved in alcohol. And it appears that your alcohol abuse had something to or related to -- had something to do with a direct correlation between the crime that you committed. So, that's why you're parole was denied two years, sir. Commissioner Weaver, any comments?

DEPUTY COMMISSIONER WEAVER: No. I think you've said it quite well, and I concur that alcohol is -- had alcohol not been involved with you in your life (inaudible) you might not be sitting here today, because it appears that there was a problem with both of you with alcohol, and it's very unfortunate, the outcome. Anyway, good luck to you, sir.

PRESIDING COMMISSIONER WELCH: All right. Thank you. Good luck to you, sir. This

hearing is concluded at 15:50.

ATTORNEY SKIPPER-DOTTA: Okay.

PAROLE DENIED TWO YEARS

EFFECTIVE DATE OF THIS DECISION APR 25 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN HERMAN PIRTLE, Petitioner, vs. CALIFORNIA BOARD OF PRISON TERMS, et al., Respondent	No. CIV S-04-0518 FCD KJM P FINDINGS AND RECOMMENDATIONS

Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2002 denial of parole. He alleges that the Board of Prison Terms arbitrarily and capriciously denied parole and that it failed to consider the uniformity clause of California Penal Code § 3031.

I. Background

On September 10, 1980, petitioner was sentenced to a term of seventeen years to life following his conviction of second degree murder and use of a gun. Answer, Ex. A. Petitioner told the probation officer who prepared the report for sentencing that "he would serve whatever time is necessary as quietly as possible and attempt to live with what he did to his

former wife, his family and friends." Answer, Appendix A (App. A) at 452.[1]

In 1987, an evaluation was prepared for a lifer documentation hearing. The psychiatrist mentioned petitioner's tendency to minimize his problems with alcohol and recommended transfer to an institution with appropriate programs, but observed "[a]t the present time, there are no psychiatric reasons why this subject should remain incarcerated." Id. at 381.

A report prepared for petitioner's initial parole hearing noted that petitioner had not pursued vocational training nor participated in Alcoholics Anonymous, as had been recommended, and suggested that petitioner "address and deal with his alcoholism" before release. The correctional counselor noted, however, that petitioner "would probably pose a relatively low degree of threat to the public at this time provided that he abstains from the use of alcohol." Id. at 343.

A psychiatric evaluation prepared for the initial hearing noted its agreement with the previous examiner's opinions that there is no applicable psychiatric diagnosis on AXIS I, no diagnosis on AXIS II." Id. at 377.

Petitioner appeared before a panel of the Board of Prison Terms on March 21, 1990. Answer, Appendix B (App. B) at 262[2]. The panel granted petitioner a parole date, "concluding that the prisoner is suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." Id. at 306. Its findings were:

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[1] Appendix A is a copy of petitioner's Central File.

[2] Appendix B is a compilation of transcripts of petitioner's hearings before the Board of Prison Terms.

Number 1. The prisoner committed the crime as a result of significant stress in his life, namely a stormy marital relationship over a two year period . . . with the victim . . . prior to fatally shooting her. The prisoner shows signs of remorse. Immediately after the crime he surrendered himself and the weapon and confessed. He has indicated he understands the nature and the magnitude of the offense. He accepts responsibility for the criminal behavior and has a desire to change . . . .

Secondly, the prisoner had a stable social history prior to the two year marriage to his wife and the victim as exhibited by stable relationships as a father and a good worker.

Number 3. The prisoner has no juvenile nor adult convictions for felony nor assaultive behavior. His prior record of convictions consists of six misdemeanors between the age of 27 and 32.

Number 4. While imprisoned, he has enhanced his ability to function within the law upon release through participation in institution job assignments as an excellent worker, and by being a model inmate.

Number 5. At age 42 years old, the prisoner has matured, grown, developed understanding, and his advanced age has reduced the possibility of recidivism.

Number 6. All of the psychiatric reports have indicated improvement and readiness for release.

> Number 7. The prisoner has realistic parole plans which include family support and job prospects in his hometown of Gridley. He has maintained close family relationships. The panel notes that a letter from the Chief of Police of Gridley supports his release and return to the prisoner's hometown.

Id. at 306-307.

The panel determined his term to be 158 months, with a release date of December 30, 1994, with a special condition that petitioner abstain from alcohol and attend Alcoholics Anonymous throughout the rest of his stay in prison and while on parole. Id. at 306-308.

In January 1993, petitioner had another psychiatric evaluation, which again noted petitioner's unblemished disciplinary record, his attendance at AA, his above average work habits, and his "history of episodic alcohol abuse." App. A at 375. The writer added that petitioner "is not an impulsive man and demonstrated no antisocially-oriented traits typical of the average inmate." Id. at 375. He, too, listed no diagnosis on either Axis I nor Axis II and concluded that "it is felt he will be successful on parole." Id. at 376.

At a progress hearing in April 1993, the panel reviewed petitioner's laudatory work chronos, positive programming, and attendance at AA, granted petitioner four months of good-time for the three years since the prior hearing, which adjusted his parole date to December 1993. App. B at 258-260.

Nevertheless, in March 1994, a panel of the Board of Prison Terms held a hearing to rescind petitioner's parole. App. B at 159. The panel noted that one of the reasons for rescission was that the

prior panel did not give "appropriate consideration" to petitioner's extensive history of alcohol abuse and "his failure to participate in AA and other self-help programs to address his alcohol addiction." Id. at 209. The panel seemed skeptical of petitioner's earlier assertion that he would not drink because "I wouldn't stick my hand in a jar of rattle snakes, so drinking would be parallel to the same thing . . . ." Id. Petitioner responded that he did not think he needed to attend and he didn't "buy the higher power and the step thing." Id. at 210. He added that he believed in the concept of "alcoholics getting together and helping each other through the program," but did not agree with the idea that "you got to have this higher power or you won't be successful in the program." Id. at 213.

The panel rescinded petitioner's parole date. Among other things, it found that the granting panel had not "given sufficient weight to the circumstances which preceded the murder of the victim," including the fact that petitioner "assaulted and battered his wife on numerous occasions prior to the murder" and on the evening of the crime, "had time to cool off after he had battered her, and instead, returned to the bar." Id. at 245-246. The panel also found that the granting panel had not given sufficient weight to the fact that petitioner "was and is an alcoholic who had refused to participate in self-help." Id. at 247.

A subsequent report, prepared in June 1994, provided an Axis I diagnosis of "alcohol abuse, by history only, in remission," but found no Axis II diagnosis. App. A at 373. The evaluating psychologist observed that petitioner's "violence level in the past as well as currently is well below average and . . . the instant offense marks an atypical or out of character incident for him." Id. He explained that "the history

of domestic abuse occurs within the context of a two year period preceding the instant offense and was not present during his prior two marriages . . . indicating a rather unique characteristic of that situation rather than highlighting chronic behavioral dynamics of this individual." Id. The evaluator concluded that petitioner "is not . . . in need of psychotherapy or clinical intervention. . . . From a clinical point of view, Mr. Pirtle is found to be suitable for parole. . . ." Id. at 374.

In February 1995, petitioner returned to the Board, which found that he was not suitable for parole because the offense was carried out "in an especially cruel and calloused manner;" petitioner has "an escalating pattern of criminal conduct and violence" and an "unstable social history"; petitioner has "failed to profit from society's previous attempts to correct his criminality;" he "needs therapy in order to face, discuss, understand, and cope with stress in a non-destructive manner." App. B at 153-154. The panel recommended that petitioner upgrade vocationally and educationally, participate in self-help and therapy programs, and cooperate in a Category X program[3] to explore his potential for violence and the significance of alcohol in his criminality, among other things Id. at 155.

In May 1995, petitioner consulted clinical psychologist Jack Fleming, "with respect to any

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[3] The Category X program is "designed to produce specialized diagnostic reports for . . . the Board of Prison Terms . . . The final evaluation is used by the Board of Prison Terms primarily to determine treatment needs and as a resource tool to assist in determining parole suitability. . . . The completed reports will address both the behavioral and psychological aspects of each case, emphasizing special problem areas." Wasko v. California Department of Corrections, 211 Cal.App.3d 996, 1003 (1989)

justification or need for a Category X evaluation, and/or involvement in psychotherapy." Dr. Fleming concluded, "To involve this man in any type of psychotherapy, or to request a Category X evaluation is a needless and profligate waste of professional effort more wisely extended to emotionally unstable prisoners, or to those who pose a likely danger to society." App. A at 181.

Petitioner returned to the Board in May 1996. He explained that although "drinking is not an issue" with him, he quit attending AA meetings because his date was rescinded even though he had faithfully attended meetings before then. App. B at 103-104. He insisted that he had not "roll[ed] over and give[n] up. I still maintain my own integrity in here." App. B at 105.

Commissioner Baker questioned petitioner about why he had not pursued a Category X or stayed with AA. App. B at 106. Petitioner responded that he could not learn the twelve steps because "if you don't believe in a higher power you can not do the 12 steps, and I don't believe in a higher power." Id. Commissioner Baker retorted that "the Board believes in the 12 steps because that's a proven program." Id.

The panel denied parole because the commitment offense "was carried out in a manner which exhibits a callous disregard for the life and suffering of another;" petitioner has an escalating pattern of criminal conduct; petitioner has "programmed in a limited manner . . . specifically, the prisoner has not participated in any beneficial self-help or therapy programs during this past year as recommended by the Board, specifically, that being AA." Id. at 113-114. The Board commended petitioner for remaining disciplinary free and for maintaining satisfactory job

performance, but found these factors did not outweigh the factors of unsuitability. Id.

The next hearing was held on December 9, 1998. App. B at 56. The panel once again denied parole for the following reasons:

> The offense was carried out in an especially cruel and callous manner and the offense was carried out in a dispassionate and calculated manner. . . . The prisoner has an escalating pattern of criminal conduct, a persistent pattern of tumultuous relationships and criminal behavior which commenced at an early age. He has failed previous grants of probation. He has failed to profit from society's previous attempts to correct his criminality . . . . He has failed to develop a marketable skill that can be used upon release. He has failed to upgrade vocationally, and he has not participated in any beneficial self-help programs. . . . . .
>
> . . . . . A recent psychological/psychiatric report . . . authored by Dr. Albert Shnaider . . . indicates a need for a longer period of observation and evaluation for treatment and he recommended therapy. . . . If there isn't an AA program that you want to be involved in, there's nothing else, then we recommend that you go to the AA. If there's something equivalent to that, instead of AA, that's acceptable.

Id. at 86-88.

On March 25, 2002, petitioner returned to the Board. Id. at 3. Before the hearing, a "Life Prisoner

Evaluation" was prepared by two correctional counselors, who concluded that:

> Considering the commitment offense, the minimal criminal history and the positive prison adjustment, this writer believes the prisoner would probably pose a low degree of threat to the public at this time if released from prison.
>
> Factors considered are the lack of a juvenile criminal history, a minimal adult arrest history, only one State Prison conviction, and the fact that Pirtle was previously found suitable for parole by the Board of Prison Terms and has maintained an exemplary program since that time.

App. A at 315.

In addition, a psychological evaluation was prepared in September 2001 by Corinne Giantonio, Ph.D. as background for the subsequent parole hearing. Answer, Ex. D. The report summarizes prior reports, which were largely favorable. Id., Ex. D at 4-5. Dr. Giantonio found petitioner's Axis I diagnosis to be "alcohol abuse, by history, in remission," but found no Axis II diagnosis. Id., Ex. D at 6. She concluded:

> In this case, there are multiple factors indicating a lower risk of recidivism. These include Mr. Pirtle's consistent and long-term employment history, his lack of major mental illness, his documented personal growth and insight, his generally positive attitude in the face of legal and emotional adversity, and the maintenance of personal support and family relations over the period of his incarceration . . . His ability

> and willingness to accept authority and the direction of the authorities and supervision also argue in favor of his ability to cooperate with supervisory aspects of parole. A stable childhood history also argues in his favor. His insight into his episodic use of alcohol and its role which he regards as interfering with good judgment and self-control also argue in his behalf.
>
> Assessment of dangerousness within the controlled setting of the institution is seen as definitely below average in comparison with other inmates. Assessment of dangerousness, if released to the community, is also seen as definitely below average. His current gains are expected to be maintained as they have been self-directed and self-incorporated.

Id., Ex. D at 7-8. Dr. Giantonio recommended that petitioner become involved with an AA-type program for atheists, noting that "many people have historically been unable to advantage themselves of the 12-Step Program because of its integrative belief system that is religious in nature. . . ." Id. She concluded that:

> Mr. Pirtle is competent and responsible for his behavior with no primary mental health disorder. Any decision for prerelease planning can be made on the record of his successful programming. There are no further psychological recommendations.

Id.

At the hearing, the panel began by surveying petitioner's stint in the Air Force and his honorable discharge in 1969, his first two marriages and his contact with his daughter, the child of his first marriage. App. B at 16-17. The panel also noted that petitioner first began to abuse alcohol at the age of fifteen and that both his and the victim's alcohol abuse had contributed to the problems in that marriage. Id. at 17. Petitioner told the panel that his drinking was sporadic: he could go for years without drinking but then drink for a few months. Id. at 19. The panel also reviewed the six instances that Gridley police were called because of domestic incidents–some physical and others verbal–between petitioner and the victim. Id. at 17-18. In response to a question from the District Attorney of Butte County, petitioner denied ever pulling a knife on the victim, as had been suggested in the probation report. Id. at 37.

The panel noted that petitioner had not upgraded vocationally, although prior panels had recommended that he do so, but noted that he has "several skills already . . [m]echanic, welder, small equipment operator, heavy duty equipment operator." App. B at 21, 44. Petitioner told the Board he had an offer of employment were he to be paroled, doing ranch work with Giovannetti and Sons in Live Oak, and would live with his sister. App. A at 240; App. B at 27, 32.

The panel acknowledged his disciplinary-free record and "excellent work record," including laudatory chronos from his supervisor at the inmate canteen and his favorable evaluation from his current job in the library. App. A at 173; App. B at 21, 34-35.

Petitioner told the panel that he had attended AA after the 1990 hearing, when he was given a parole date, but maintained his basic unease with the program because of its focus on God. App. B at 26-27. However, as noted in the life prisoner evaluation report, petitioner agreed to "involve himself in any . . . secular program that is available in his area of parole and his family . . . has apprised him of substance abuse programs in the area that meet that criteria." App. A at 315. Petitioner presented the panel with a list of secular sobriety programs in Northern California[4] App. B at 31.

The Board of Prison Terms denied him a parole date for the following reasons:

> The Panel reviewed all information received from the public and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. The offense was carried out in an especially cruel and callous manner. The offense was carried out in a dispassionate calculated manner. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. The motive for the crime was inexplicable or very trivial in relationship to the offense. The conclusion was drawn from the Statement of Facts where on March 8, 1980 at approximately 1:17 a.m. the Gridley . . . Police Department was notified

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[4] The list itself is not in the record in this case.

of a shooting at The Moose Lodge. Upon arrival, they found the victim, Diane, the prisoner's wife . . . was lying on the floor with a gunshot wound to her upper chest area. The circumstances around the shooting is that the prisoner went into The Moose Lodge, and observed his wife dancing with another person. He went into (inaudible). He walked up and put his arms around her and used a 25 caliber weapon to shoot her. He placed it to her chest and shot her in the chest, and that penetrated her heart and her liver, and she succumbed to her wounds. The prisoner has an escalating pattern of criminal behavior. He's failed previous grants of probation and cannot be counted upon to avoid criminality. . . . He's failed to profit from society's previous attempts to correct his criminality. Such attempts include adult probation and county jail. The prisoner's unstable social history would primarily be centered around his alcohol abuse . . . . His prior criminality includes arrests for disorderly conduct, escape from a county farm, speed contest and a DWI, driving while under the influence. Also, it's noted that an unstable social history, I guess we should also note the prisoner's domestic encounters. His escalating pattern of domestic encounters where the police department was frequently called because of domestic allegations that the prisoner was being abusive to his wife, for fights with the prisoner and his wife. So, we had an escalating pattern of domestic

violence conduct. The prisoner has failed to upgrade vocationally as previously recommended by other Panels. The prisoner got a good psychiatric report. The psychiatric report by Dr. Giantonio was a supportive report. The prisoner's parole plans, the prisoner has made parole plans. They could use some tightening up, but overall, the prisoner has made some effort to develop parole plans (inaudible) has been in prison for over 20 years. So, he did put some effort into that. The Hearing Panel notes that in response to Penal Code 3042 notices indicate an opposition to a finding of parole suitability. And specifically, . . . the District Attorney . . . Butte County spoke in opposition of a finding of suitability at this time. The Panel makes the following findings. The prisoner needs to be able to face, discuss, understand and cope with stress in a non-destructive manner. Until progress is made, the prisoner continues to be unpredictable and a threat to others. Nevertheless, there are some things that the prisoner should be commended for. The prisoner did take an Alternatives to Violence program. He gets good work reports. . . . And he got a good psychiatric report from the doctor. However, these positive aspects of his behavior does [sic] not outweigh the factors of unsuitability. Parole is denied for two years. In a separate decision, the Hearing Panel finds that it's not reasonable to expect that parole would be granted at a hearing

during the following two years. Specific reasons for these findings are as follows. The prisoner committed the crime in an especially cruel manner. His wife was at a Moose Lodge. She was dancing. The prisoner went there previously and . . . slapped his wife. He left. He had a lot of time to think about it. He encountered a police [officer] who told him to go home and get some sleep. He went home to get some sleep, and he retrieved a weapon. He came back to the lodge, and he shot his wife down on the dance floor. The offense was carried out in a dispassionate and calculated manner. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. The motive for the crime was inexplicable or very trivial in relationship to the offense. The prisoner had a history of unstable or tumultuous relationships with others. He had been married three times, and his last marriage he characterized as turbulent. The prisoner has not completed necessary programming, which is essential to his adjustment, and he needs additional time to gain such programming. He's not participated in the vocational programs that's available at the different institutions. He's failed to participate in substance abuse programming. Now, let it be clear that the Board does not advocate any one type of substance abuse program over another one, that is a faith based program over a non-faith based program.

But, certainly, with the prisoner's history of substance abuse and alcohol use, he should be involved in some kind of substance abuse program, and it should not only be a substance abuse program while incarcerated, but it should be a commitment. In your parole plans, sir, there should be (inaudible) substance abuse planning that you're committed to being involved in some type of substance abuse program, especially with your prior record (inaudible) where people were injured. So, you have to get involved in some type of substance abuse program. Therefore, the Panel recommends that you remain disciplinary free, that if available, you upgrade vocationally, and that you participate in some type of substance abuse program or self-help program. For that matter, any other type of self-help program that deal [sic] with anger management, stress management, those type of things. Mr. Pirtle, it seems like you want to do it your way in terms of getting a parole date. . . .We can't just take your word that you're not going to get involved in any type of substance abuse once you get out. You've been in prison. The Boards have told you to participate in vocational kinds of programs, and during our deliberation we talked about whether you would get involved and try to become a bartender or not. But, sir, as long as you've been in prison you've had the opportunity to get a vocation, certainly as long as you've been in prison you've had the

> opportunity to get involved in some type of substance abuse program. And with your record, you must realize that there is an awesome responsibility for this Board to try to determine a parole date for you when you have not made a lifelong commitment to a substance abuse program. . . It's too much of a risk to The People of Butte County and The People of California to sit here and take your word because when you went to that other (inaudible) for substance abuse problem, you didn't stay there. You escaped. And you went out and still got involved in alcohol. And it appears that your alcohol abuse had something to or related to – had something to do with a direct correlation between the crime that you committed. So, that's why you're [sic] parole was denied two years, sir.

Answer, Ex. B, Board Decision 1-7.

The California Supreme Court denied petitioner's challenge to his denial on December 10, 2003. Answer, Ex. F.

II. Standards Under The AEDPA

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application

> of, clearly established federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (referenced herein as "§ 2254(d)" or "AEDPA"). See Ramirez v. Castro, 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court's grant of habeas relief under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did not address the merits of petitioner's Eighth Amendment claim).[5] Courts are not required to address the merits of a particular claim, but may simply deny a habeas application on the ground that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v. Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district

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[5] In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals held in a § 2254 action that "any independent opinions we offer on the merits of constitutional claims will have no determinative effect in the case before us . . . At best, it is constitutional dicta." However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title 28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71; Ramirez, 365 F.3d at 773-75.

courts to review state court decisions for error before determining whether relief is precluded by § 2254(d)). It is the habeas petitioner's burden to show he is not precluded from obtaining relief by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are different. As the Supreme Court has explained:

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams [v. Taylor, 529 U.S. 362 (2000)] that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8 (2002).

The court will look to the last reasoned state court decision in determining whether the law

applied to a particular claim by the state courts was contrary to the law set forth in the cases of the United States Supreme Court or whether an unreasonable application of such law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S. 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court must perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other words, the court assumes the state court applied the correct law, and analyzes whether the decision of the state court was based on an objectively unreasonable application of that law.

It is appropriate to look to lower federal court decisions to determine what law has been "clearly established" by the Supreme Court and the reasonableness of a particular application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999).

III. Parole In California

In Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7, 11 (1979), the United States Supreme Court found that an inmate has "no constitutional or inherent right" to parole, even when a state establishes a system of conditional release from confinement. The Court recognized, however, that the structure of parole statutes might give rise to a liberty interest in parole that would, in turn, mean an inmate was entitled to certain procedural protections. Id. at 14-15. In Greenholtz, the Court found that the "mandatory language and the

structure of the Nebraska statute at issue" created such a liberty interest. Board of Pardons v. Allen (Allen), 482 U.S. 369, 371 (1987).

In McQuillion v. Duncan, 306 F.3d 895 (9th Cir. 2002), the Ninth Circuit used the Greenholtz-Allen framework to determine whether California statutes created a liberty interest in parole. The critical statute at issue in McQuillion is California Penal Code section 3041, which provides in relevant part:

> (a) In the case of any prisoner sentenced pursuant to any provision of law, other than [the determinate sentencing law], the Board of Prison Terms shall meet with each such inmate during the third year of incarceration for the purposes of reviewing the inmate's file, making recommendations, and documenting activities and conduct pertinent to granting or withholding post-conviction credit. One year prior to the inmate's minimum eligible parole release date a panel consisting of at least two commissioners of the Board of Prison Terms shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5.[6] The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any

[6] Cal. Penal Code § 3041.5 establishes procedural requirements for Board hearings.

> sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the prisoner was sentenced and other factors in mitigation or aggravation of the crime....
>
> (b) The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

The Ninth Circuit found that subdivision (b) was like the statutes in both Greenholtz and Allen:

> California's parole scheme gives rise to a cognizable liberty interest in release on parole. The scheme "'creates a presumption that parole release will be granted'" unless the statutorily defined determinations are made.

McQuillion, 306 F.3d at 901-02. Again in Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003), the Court of Appeals reiterated its holding that the California parole scheme created a liberty interest in parole, noting that "California Penal Code § 3041(b) controls" the resolution of the question because its "language clearly parallels the language" under consideration in Greenholtz and Allen. See also In re Rosenkrantz, 29 Cal.4th 616, 654 (2002), cert. denied, 538 U.S. 980 (2003) (discussing § 3041(b), the

California Supreme Court noted "parole applicants . . . have an expectation that they will be granted parole unless the Board finds . . . that they are unsuitable in light of the circumstances specified by statute and regulation").

The existence of a liberty interest means that a decision to deny parole must be supported by some evidence and not be otherwise arbitrary. Superintendent v. Hill, 472 U.S. 445, 455 (1985); Jancsek v. Oregon Board of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). The test is "not whether some evidence supports the reasons . . . for denying parole, but whether some evidence indicates a parolee's release unreasonably endangers public safety." In re Lee, 143 Cal.App.4th 1400, 1408 (2006) (emphasis in original). The evidence must have some indicia of reliability. Biggs, 334 F.3d at 915. The "some evidence" requirement is a "minimally stringent" standard and does not require the court to reweigh the evidence or examine the entire record. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994); Hill, 472 U.S. at 455-56.

> [The] analysis is framed by the statutes and regulations governing parole suitability determinations . . . . [W]e must look to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole, and then must review the record in order to determine whether the state court decision holding that these findings were supported by "some evidence" . . . and then must review the record in order to determine whether the state court decision holding that these findings were supported by "some evidence" [] constituted an

> unreasonable application of the "some evidence standard" principle articulated in Hill.

Irons v. Carey, 479 F.3d 658, 662 (9th Cir. 2007).

The Board's regulations for setting parole release dates are found in title 15 of the California Code of Regulations. Section 2401 of this title provides:

> A life prisoner shall be considered for parole for the first time at the initial parole consideration hearing scheduled as provided in Section 2268. A parole date shall be denied if the prisoner is found unsuitable for parole under Section 2402(c). A parole date shall be set if the prisoner is found suitable for parole under Section 2402(d). A parole date set under this article shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude with respect to the threat to the public.
>
> In setting the parole date the panel shall consider the Sentencing Rules for the Superior Courts. The panel shall also consider the criteria and guidelines set forth in this article for determining the suitability for parole and the setting of parole dates, considering the number of victims of the crime for which the prisoner was sentenced and any other circumstances in mitigation or aggravation.
>
> The terms in this article are guidelines only. The suggested terms serve as the starting point for the board's consideration of each case on an individual basis. The board may establish a term

above or below the guidelines when warranted and reasons are stated on the record. A prisoner shall not be released before the minimum eligible parole date.

15 Cal. Code Regs. § 2401.

Section 2402 provides:

(a) General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

(b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a

pattern which results in a finding of unsuitability.

(c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.
(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.
(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.
(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.
(d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include:
(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.
(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.
(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or

> indicating that he understands the nature and magnitude of the offense.
> (4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.
> (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.
> (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.
> (7) Age. The prisoner's present age reduces the probability of recidivism.
> (8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.
> (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

15 Cal. Code Regs. § 2402.

Once the Board determines that an inmate is suitable for parole, it proceeds to set a date for the inmate's release, based on numerous factors provided in sections 2403 through 2411. The paramount concern in determining parole suitability is public safety. In re Dannenberg, 34 Cal.4th at 1080, 1084, 1085, 1086 ("the overriding statutory concern" is for public safety; purpose of the statutes is to "guarantee that the Board has fully addressed the public safety implications" of the release determination).

IV. Arbitrary Denial Of Parole

Petitioner argues that his "crime . . . is . . . not an evidential reason for finding him unsuitable" because it is not especially heinous, atrocious or cruel. Pet., Memorandum of Points and Authorities (Mem. P. & A.) at 7. He also argues that his minor criminal history should be deemed a suitability, rather than an unsuitability, factor under the regulations and that his "criminal record has not changed during his incarceration," making reliance on it arbitrary. Id. at 9. Next, he argues that his failures to pursue self-help programs and vocational programs "are not valid reasons" for the denial of parole. Id. at 10. Finally, he contends that he is being penalized for not attending Alcoholics Anonymous despite his objections to its religious basis, and his stale history of alcohol abuse is not a sufficient basis for the denial of parole. Id. None of the Board's reasons for the denial, in petitioner's view, has any bearing on public safety and ignore the two reports prepared for the hearing, which found his violence potential to be low. Id.at 11.

A. The Crime

The Board found that the crime was committed in an especially heinous, atrocious, or cruel manner because it was carried out in a dispassionate, calculated and cruel manner with an exceptionally callous disregard for suffering and because the motive was inexplicable or trivial in relationship to the offense. See 15 Cal. Code Regs. § 2402(c)(1)(B), (D)-(E).

1. Cruel and Callous Disregard For Suffering

In In re Smith, 114 Cal.App.4th 343 (2003), the

California Court of Appeal for the Sixth Appellate District considered the question when a second degree murder can be deemed cruel and callous to human suffering so as to demonstrate an inmate's nonsuitability for parole. The court in Smith observed that:

> [I]t can reasonably be said that all second degree murders by definition involve some callousness–i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others.

Id. at 366 (emphasis in original). As with petitioner, Smith had been convicted of second degree murder for killing his wife after learning that his disintegrating marriage was beyond repair as a result of his wife's unfaithfulness. When the victim told Smith she "did not want anything further to do with [him]," he took a gun and shot her once in the head and then twice more as she fell. Id. at 351. The court found that the crime was not cruel or callous to the suffering of others:

> There is no evidence that Smith acted with cold, calculated dispassion; or that he tormented, terrorized, or injured Garner before deciding to shoot her; or that he gratuitously increased or unnecessarily prolonged her pain and suffering. . . . Was the crime callous? Yes. However, are the facts of the crime some evidence that Smith acted with exceptionally callous disregard for Garner's suffering; or do the facts distinguish this crime from other second degree murders as exceptionally callous? No.

Id. at 367; see also In re Lee, 143 Cal.App.4th at 1409 ("measure of atrociousness is not general notions of common decency or social norms. . . . Rather, the inquiry is whether among murders the one committed by Lee was particularly heinous, atrocious or cruel"); In re Dannenberg, 34 Cal.4th at 1095 (a murder is "particularly egregious" if there is violence or viciousness beyond what is minimally necessary for conviction).

In this case, the day before the shooting, petitioner and his wife had a lengthy discussion about their marital problems and decided to make a further attempt to repair their marriage. App. B at 12. The next day, his wife told him she wanted to stay in town to drink after work; when he later found her at the Moose Lodge, she was with another man. Upset, he slapped her and left, drank some more and then returned home and went to bed. App. B at 11, 13. When he woke up, his wife was not home, so he returned to the Moose Lodge and found her dancing with another man. He ordered a drink, waited for the music to stop, and then asked if she was ready to go home. Id. When his wife said she was going to go home with Ron, her dancing partner, he put his arm around her and shot her in the chest. Id. at 12, 13; App. A at 490 (Court of Appeal opinion reports that the bartender at the Moose Lodge testified that the victim said "I finally left him tonight").

As in Smith, the facts underlying petitioner's conviction do not support a finding that the crime was cruel or callous and, by extension, a finding that petitioner remains a danger to society. Petitioner did not torment or terrorize his wife; his earlier slap, while inappropriate, did not appear to have an effect on the victim, who continued to drink and dance. There is nothing to suggest that he gratuitously

caused her to suffer; nothing in the record suggests that she lived for long after the single bullet penetrated her heart.

2. Calculated And Dispassionate

In defining a "calculated and dispassionate" murder, the regulation refers to an execution-style murder as an example. The dictionary definitions support the connection between this factor and an execution-style killing: "dispassionate" means "free from or unaffected by passion; devoid of personal feeling or bias; impartial; calm," while "calculated means "carefully thought out or planned." See www.dictionary.com <accessed 3/7/07>.

The instant record does not support the finding that the murder was calculated and dispassionate. Personal feeling and emotion is what fueled the crime, for petitioner acted in the knowledge that his attempts to salvage his marriage had failed and after his wife had told him she was going home with another man. Moreover, nothing in the record indicates the killing was carefully thought out or planned: petitioner killed his wife in full view of witnesses after being rejected by his wife.

3. Inexplicable or Trivial Motive

In In re Scott, 119 Cal.App.4th 871 (2004), the Court of Appeal for the First Appellate District considered the meaning of these terms as they relate to the parole decision. In that case, the inmate killed a man who had threatened him, cuckolded him and supplied his wife with drugs. The Board of Prison Terms denied him parole on the ground, among others, that the motive was inexplicable or trivial. The court disagreed:

> The epistemological and ethical problems involved in the ascertainment and

> evaluation of motive are among the reasons the law has sought to avoid the subject. . . . An "inexplicable" motive, as we understand it, is one that is unexplained or unintelligible, as where the commitment offense does not appear to be related to the conduct of the victim and has no other discernible purpose. A person whose motive for a criminal act cannot be explained or is unintelligible is therefore unusually unpredictable and dangerous.

Id. at 892-93. Moreover,

> [t]he reference in Board regulations to motives that are "very trivial in relationship to the offense" therefore requires comparisons; to fit the regulatory description, the motive must be materially less significant . . . than those which conventionally drive people to commit the offense in question, and therefore more indicative of a risk of danger to society if the prisoner is released .

Id. at 893. The court found that Scott's motive was neither trivial nor inexplicable, for "the emotional pain caused by the departure or infidelity of a loved one is often seen by juries as diminishing self-control. . . ." Id. at 894. It concluded that the finding that the motive was inexplicable or trivial "ignores . . . human nature and experience." Id.

The same reasoning applies to this case. The motive was not inexplicable, because it was related to the conduct of the victim in the context of petitioner's shaky marriage; as Dr. Sprick observed in 1994, the instability of this third marriage was "a rather unique characteristic of that situation rather than . . . chronic behavioral dynamics of this individual."

App. A at 373. The motive was not trivial because it was related to "emotional pain caused by the . . . infidelity" of petitioner's wife.[7] The panel that granted petitioner parole in 1990 found that the circumstances relating to petitioner's shooting of his wife suggested that the crime was committed as a result of significant stress in petitioner's life. App. B at 306.

B. Escalating Pattern Of Criminal Behavior; Failure To Profit From Society's Attempts To Correct His Criminality

The panel recognized that petitioner has no record of juvenile arrests, but had volunteered the fact that he had been arrested at age fourteen for forging a check on his uncle's account, had served seven days in juvenile hall and thereafter been placed on probation. App. B at 15. The lack of a juvenile record of violent or assaultive behavior is a factor suggesting suitability for parole, which the panel appears not to have recognized. 15 Cal. Code Regs. § 2402(d)(1); see also Life Prisoner Evaluation, App. A at 315 ("the minimal criminal history" is one factor suggesting that petitioner would pose a "low degree of threat to the public" if paroled).

Petitioner's record as an adult consists of one felony--a 1975 drunk driving with injury--, and several misdemeanors—drunk driving, disturbing the peace, disorderly conduct, and escape from the county honor farm. App. B at 15; App. A at 450. To "escalate" is "to increase in intensity, magnitude,

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[7] The court cannot help but be reminded of the universal themes expressed in William Shakespeare's Othello, despite multiple distinctions in plot as between that great tragedy and petitioner's story. See especially Othello, Act 5, sc. 2

etc." See www.dictionary.com <accessed 3/7/07>. A record consisting of a string of misdemeanors and a single felony does not fit neatly within the definition of escalation; indeed, petitioner's lack of "any significant history of violent crime" is a factor suggesting suitability for parole. 15 Cal. Code Regs. § 2402(d)(6). There is not substantial evidence supporting the panel's conclusion that petitioner's twenty-five year old criminal record shows that he would pose a danger to the public if released.

The panel also relied on petitioner's failure to profit from society's attempts to correct his criminality, which included grants of probation, which he failed, and county jail. App. B at 48. The probation report prepared for petitioner's Butte County sentencing in 1980 listed his criminal record and the punishment for each conviction; there is no indication that petitioner was put on probation, much less that he failed a grant of probation. App. A at 450. Petitioner did serve two jail terms in 1976, a nine month sentence for the drunk driving with a consecutive six month sentence for the escape from the honor farm. App. A at 450. This does not qualify as some evidence that petitioner "cannot be counted on to avoid criminality," for the predictive power of this old record has been dissipated through the passage of time and petitioner's unblemished prison record; its minor nature is actually a factor favoring suitability under the regulations. As the California Court of Appeal has recognized, this factor must be viewed "within the context of the other factors [the panel] must consider to see if some evidence shows [the inmate] continues to pose an unreasonable risk to public safety." In re Lee, 143 Cal.App.4th at 1409.

C. Unstable Social History

The 1990 panel that granted parole found petitioner's social history to be stable apart from his two year marriage to the victim. App. B at 306. The panel that considered petitioner's application for parole in 2002 found that his social history was unstable because of his alcoholism and the instances of domestic violence during petitioner's marriage to the victim. Id. at 48-49.

1. Tumultous Relationships

Dr. Giantonio's report contains a summary of petitioner's social history. It examined petitioner's stable upbringing despite his parents' divorce, his two uneventful marriages to two women before his marriage to the victim, his role as custodial parent to his children from his first marriage, followed by his turbulent marriage to the victim, who engaged in extramarital affairs and essentially left petitioner to be a parent not only to his two children, but to her own two children. Answer, Ex. D at 2-4.

In In re Scott, 119 Cal.App.4th at 896, the court examined a finding similar to that of the 2002 panel and found that it was not supported by sufficient evidence. In Scott, the psychologist's report prepared for the panel noted that the inmate had an "exemplary family history," no substance abuse or psychological problems apart from the brief adjustment disorder occasioned by his wife's drug abuse and infidelity. The court concluded, therefore, that even though the inmate had had an "unstable or tumultuous" relationship with the victim, that was not sufficient evidence to support the panel's finding in light of his otherwise stable social history.

The Court of Appeal for the Sixth Appellate District reached a similar conclusion in In re Smith, supra. In Smith, the Governor overturned a grant of parole in part because of the inmate's "'deep-rooted

pattern' of social instability, drug use and violence against the victim." Smith, 114 Cal. App. 4th at 368. In that case, as here, the psychologist found that the inmate's violence "was focused on only one person and manifest for only two years" and that there was no violence in his other relationships or in prison. Id. at 369.

Here, the record reflects petitioner's single unstable relationship was with the victim of the commitment offense; the only reports of domestic violence flowed from this single relationship. Nothing in the record contradicted the psychologist's reliance on petitioner's "stable childhood," and "the maintenance of personal support and family relations" to determine that petitioner poses a "below average" risk of danger upon release. Answer, Ex. D at 8.

2. Alcohol Abuse[8]

The psychologist considered petitioner's history of alcohol abuse, which includes "sporadic and periodically heavy usage of alcohol from time to time," and his recognition that he can "never return to its use." Answer, Ex. D at 4. She described his "insight into his episodic use of alcohol and its role which he regards as interfering with good judgment and self-control." Id. at 8. His Axis I diagnosis was

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[8] Perhaps it is significant or perhaps it is an oversight, but the panel did not base its denial on petitioner's failure to attend AA or its secular counterpart. It did, however, mention petitioner's need for further treatment or self-help in making the "separate decision" that it was not likely that parole would be granted in the next two years. App. B at 51-52. To the extent that this can be deemed to be part of the denial, as in Smith, there is nothing in the record suggesting that treatment in prison would render petitioner less dangerous than if he received treatment in the community after release.

"alcohol abuse, by history, in remission." Id., Ex. D at 6.

It is not disputed that petitioner attended Alcoholics Anonymous only until his parole date was rescinded in 1994. However, the psychologist observed only that "should a parole date be offered, it is recommended that Mr. Pirtle advantage himself of these AA programs for Atheists." Id., Ex. D at 8.

There also is no dispute that petitioner's abuse of alcohol was a factor in his drunk driving convictions and the commitment offense. However, there is nothing in the record to contradict the diagnosis of "alcohol abuse, by history, in remission" or suggest that petitioner would be prone to returning to alcohol, and by extension, to instability, when released. Again, a similar situation was addressed in In re Smith, supra. In that case, the inmate had a lengthy history of substance abuse which, the court found, did not directly lead to the murder of his wife. The Governor had reversed the finding that the inmate was suitable for parole in part because of a perceived need for further drug treatment. The Court of Appeal rejected this rationale:

> There is no evidence that Smith denies he had a drug problem or denied he had a problem for some period of his incarceration. There is no evidence that he refused, failed, or did poorly in drug treatment programs. And there is no evidence that Smith ever used any type of illicit substance during his incarceration. Nor does the record support a reasonable belief that without further drug treatment in prison, Smith might start taking drugs again.

Id. at 371 (emphasis in original). In this case,

petitioner attended Alcoholics Anonymous when the Board made that a condition of release, but then stopped after his date was rescinded because of his disagreement with the program's focus on religious principles. Cf. Turner v. Hickman, 342 F.Supp.2d 887, 896 (E.D. Cal. 2004). More fundamentally, however, in light of the diagnosis of alcohol abuse in remission and the psychologist's and counselor's opinions that petitioner's potential for violence upon release was below average, the record does not support the panel's determination that petitioner's abuse of alcohol up to 1980 rendered him dangerous in 2002.

D. Failure To Upgrade Vocationally

While petitioner had not, perhaps, upgraded vocationally, he had maintained steady employment while in the institution, building an employment record characterized as "exceptional." App. A at 317-318. Moreover, as petitioner told the panel, he had job skills and an offer of employment on release. App. B at 21, 27, 44. The Court of Appeal for the Sixth Appellate District observed in the case of DeLuna:

> The Board stated that defendant had failed to upgrade his vocational training, apparently dissatisfied with defendant's training in landscape and gardening. While there is evidence that defendant has concentrated in prison on certain vocational skills, we do not perceive any connection between his gardening skills . . . and the Board's conclusion that "he would pose an unreasonable risk of danger to society or a threat to public safety if released from prison." Nothing in the record indicates that defendant's criminality or ability to support himself

> was affected by any limitation of his vocational . . . skills.

In re DeLuna, 126 Cal.App.4th 585, 597 (2005). In this case as well, there is no connection between what the panel perceived as petitioner's limited vocational skills and his life crime, and nothing to suggest that his failure to secure other job skills renders him dangerous.

E. Need For Therapy To Cope With Stress

Dr. Giantonio found:

> Mr. Pirtle evidences signs of maturity, personal insight and personal growth. He admits to feelings of discouragement and hopelessness during which period he tends to withdraw and isolate . . . [H]e remains cooperative with prisoner programming and continues his impeccable record with no CDC-115s at any time during his incarceration. He is an avid reader and utilizes both fiction and nonfiction to help him cope with his more difficult days.

Answer, Ex. D at 6. She continued:

> Mr. Pirtle is competent and responsible for his behavior with no primary mental health disorder. Any decision for prerelease planning can be made on the record of his successful programming. There are no further psychological recommendations.

Id., Ex. D at 8. As the Court of Appeal for the First Appellate District held on a similar psychologist's report:

> [T]he Board lacked even "some evidence" to support the finding that [t]he prisoner needs therapy in order to face, discuss,

> understand and cope with stress in a non-destructive manner.

In re Ramirez, 94 Cal.App.4th 549, 571 (2001), disapproved on other grounds, In re Dannenberg, 34 Cal.4th 1061 (2005). The finding in this case similarly lacks evidentiary support.

F. Other Considerations

In Biggs, 334 F.3d at 916, the Ninth Circuit suggested that

> [o]ver time. . . should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole.

See also Sass v. California Board of Prison Terms, 461 F.3d 1123, 1129 (9th Cir. 2006).

However, in Irons, the court said:

> We note that in all the cases in which we have held that a parole board's decision to deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with due process, the decision was made before the inmate had served the minimum number of years required by his sentence. . . . All we held in those cases and all we hold today, therefore, is that, given the particular circumstances of the offenses in these cases, due process was not violated when these prisoners were deemed unsuitable

> for parole prior to the expiration of their minimum terms.

479 F.3d at 665.[9]

In California, an inmate has a minimum eligible parole date (MEPD), which is the earliest date a "life prisoner may legally be released on parole." 15 Cal. Code Regs. § 2000(b)(67). At the time petitioner was sentenced, this date was computed by applying postsentence good time and work time credits to the minimum term of fifteen years for second degree murder. See In re Dayan, 231 Cal.App. 3d 184, 186 (1991). Petitioner's MEPD was August 6, 1989. App. A at 24.

If the minimum term of fifteen years is the Irons triggering point for second degree murder, then petitioner reached this date long ago: his minimum term of seventeen years, even without considering any credits, was September 12, 1997. App. A at 23.

Petitioner appeared before the Board in 1998 and 2002, both times after his minimum term had already run. Each time, the Board relied on factors no longer within petitioner's control--the nature of the crime and his prior history, both criminal and social, while barely acknowledging petitioner's clean institutional record, steady work history, maturity and introspection--rendering the decision to deny him parole arbitrary and a violation of his liberty interest in parole.

V. Uniformity Under Penal Code § 3041(a)

In Dannenberg, the California Supreme Court noted:

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[9] The court did not explain why the arbitrary nature of continued reliance on unchanging factors may violate due process only after the minimum sentence has been served.

> Our conclusion that California's parole statutes allow the Board to find unsuitability without engaging in a comparative analysis of other offenses or applying "uniform term" principles, and that the Board adhered to state law in Dannenberg's case, also disposes of his contention that he was denied federal due process rights arising from his protected liberty interest, and expectation, in a "uniform" parole release date.

Dannenberg, 34 Cal.4th at 1098 n.18. In the case, the state supreme court resolved the "tension between the commands in subdivisions (a) and (b)" of Penal Code section 3041, and the question whether "the public-safety provision of subdivision (b) takes precedence over the 'uniform terms' principle of subdivision (a)." Id. at 1081-82. To answer the question, the court examined related legislation, statutory language, case law and agency interpretations. It noted that

> [s]o long as the Board's finding of unsuitability flows from pertinent criteria, and is supported by "some evidence" in the record before the Board, the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders. Section 3041 does not require the Board to schedule an inmate's release when it reasonably believes the gravity of the commitment offense indicates a continuing danger to the public, simply to ensure that the length of the inmate's confinement will

> not exceed that of others who committed similar crimes.

Id. at 1084 (internal citation omitted). The court recognized the Board's broad discretion in determining an inmate's suitability for parole, but also recognized that "the current statute requires the Board to act in each case, either by setting a parole release date, or by expressly declining to do so for reasons of public safety." Id. at 1098. Its ultimate holding is this:

> We therefore hold that the Board proceeded lawfully when, without comparing Dannenberg's crime to other second degree murders, to its base term matrices, or to the minimum statutory prison term for that offense, the Board found him unsuitable to receive a fixed and "uniform" release date by pointing to some evidence that the particular circumstances of his crime . . . indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he remains a danger to public safety.

Id. What Dannenberg did, then, was to find that the provisions of section 3041(a), which appear to require the Board to set a minimum, uniform term, did not create a liberty interest in parole, because the parole board was required to undertake the public safety inquiry of subdivision (b) before setting a uniform term. In this case, because the Board failed to find petitioner suitable, there is no independent due process violation flowing from its failure to set a uniform term for him.

VI. Request For Judicial Notice

Petitioner has asked the court to take judicial

notice of subsequent denials of parole, which are based on essentially the same reasons given by the panel in 2002 and has attached copies of parole board decisions from 2004 and 2006. This motion is granted. Fed. R. Evid. 201(b)(2).

The 2004 and 2006 hearings show that the Board continues to rely on the "callous" circumstances of the crime, petitioner's criminal record, his unstable relationships, his failure to upgrade vocationally and to pursue self-help programs, particularly those for alcoholics. Mot. For Judicial Notice, Ex. A at 1-4 & Ex. B at 1-4.

VII. The Remedy

In 2002 the Board relied on factors not supported by the requisite "some evidence"; it has continued to rely on those factors to deny petitioner parole. In these circumstances, directing the Board to hold another hearing would be futile.

IT IS HEREBY ORDERED that:

1. The Federal Defender's Office be appointed to represent petitioner; and

2. The Clerk of the Court is directed to serve a copy of this order on David Porter, Assistant Federal Defender.

IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be granted and the Board of Prison Terms set a parole date for petitioner within thirty days of any order adopting these findings and recommendations.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations,

any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 16, 2007.

/s/ K. Mueller
US MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
Aug 27 2010
Clerk US District COURT
Eastern District of California
By _____

JOHN HERMAN PIRTLE, vs. Petitioner, CALIFORNIA BOARD OF PRISON TERMS, et al., Respondent.	No. CIV S-04-0518 FCD KJM P Eastern District of California, Sacramento ORDER

This matter is before the Court on Petitioner Pirtle's motion for immediate release. Previously, this Court granted habeas relief after determining that Petitioner's federally protected rights to Due Process of law were violated by the 2002 Board's reliance on factors not supported by the requisite "some evidence" to deny Petitioner parole. On August 11, 2010, the Board of Parole Hearings conducted a parole suitability hearing at which it found Petitioner suitable for parole and set his total custodial term at 240 months. The Board granted him 116 months of postconviction time credits. Thus, his total term in custody was set at 124 months. Petitioner has already served over 30 years in prison for his crime.

Petitioner contends that any lawful term set by the Board has been fully satisfied and thus his release should not be further delayed by the Board's decision review process, which can take up to 120 days following a hearing. Respondents oppose the motion for release and have sought rehearing en banc of the Ninth Circuit opinion that affirmed this Court's judgment. Respondents contend that the decision review process is a necessary step for error correction in the term setting and confirmation of parole plans. But no party has suggested the facts in Mr. Pirtle's case raise any questions about the term chosen or Mr. Pirtle's parole plans. Respondents also intend to release Mr. Pirtle to parole once the Board's review unit completes its review. Although opposing immediate release, Respondents nonetheless agree to supervise Mr. Pirtle on parole if he is ordered released by this Court. In light of the above-facts, IT IS HEREBY ORDERED that Petitioner's motion for immediate release is granted. Within 15 days of the date of this order, Respondents shall release Petitioner to parole. Within 25 days of the date of this order, Respondents must also file a notice with the Court confirming the date on which Mr. Pirtle was released.

DATED: August 27, 2010.

/s/ F. Damrell
FRANK DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN HERMAN PIRTLE, Petitioner, vs. CALIFORNIA BOARD OF PRISON TERMS, et al., Respondent.	No. CIV S-04-0518 FCD KJM P JUDGMENT IN CIVIL CASE

XX –Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 5/29/07

Victoria C. Minor
Clerk of Court

ENTERED:
June 12, 2007

by: /s/ D. Davis
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN HERMAN PIRTLE, Petitioner, vs. CALIFORNIA BOARD OF PRISON TERMS, et al., Respondent	No. CIV S-04-0518 FCD KJM P ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On April 17, 2007, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Respondent has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72- 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed April 17, 2007, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is granted and the Board of Prison Terms shall set a parole date for petitioner within thirty days from the date of this order.

DATED: May 25, 2007.

/s/ F. Damrell
FRANK DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

SEAL of the SUPREME COURT

Of CALIFORNIA

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE .SUPREME COURT

September 19, 2003

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Re: S119114 - In re John Herman Pirtle on Habeas Corpus

Dear Counsel:

The court has directed that I request an answer to the above referenced matter, petition served on your office September 14,2003. The answer is to be served upon petitioner and filed in this court on or before October 10,2003. Petitioner will then have ten (10) days in which to serve and file a reply to the answer.

Your answer should be addressed to the merits of the petition.

Please be advised that the instant petition is a petition for review, and a ruling by the court is due on or before November 14, 2003. This request for an answer should be expedited by your office, and no requests for extension of time are contemplated.

Very truly yours,
FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

Enclosures
cc: John Herman Pirtle, Petitioner Rec./Reg.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 20 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

ROBERT EVERETT JOHNSON,

Petitioner - Appellant,

v.

CLAUDE E. FINN; BILL LOCKYER, Attorney General,

Respondents - Appellees.

No. 06-17042

D.C.No.CV-05-00385-GGH
Eastern District of California, Sacramento

MANDATE

The judgment of this Court, entered September 03, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT
Molly C. Dwyer
Clerk of Court
Theresa Benitez

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 09 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

ROBERT EVERETT JOHNSON,

Petitioner - Appellant,

v.

CLAUDE E. FINN; BILL LOCKYER, Attorney General,

Respondents - Appellees.

No. 06-17042

D.C.No.CV-05-00385-GGH
Eastern District of California, Sacramento

ORDER

Before GIBSON,* BERZON, and BEA, Circuit Judges.

Respondents' motion to stay the mandate is granted temporarily. We remand this case on a limited basis and direct the district court to set the conditions of Appellant's release so that he may be

* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

located and reincarcerated should the Supreme Court reverse the panel's judgment.

The Clerk shall issue the mandate seven days after the district court issues its order setting the conditions of release.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 20 2010

Molly C. Dwyer,
Clerk
U S Court of Appeals

ROBERT EVERETT JOHNSON,

Petitioner - Appellant,

v.

CLAUDE E. FINN; BILL LOCKYER, Attorney General,

Respondents - Appellees.

No. 06-17042

D.C.No.CV-05-00385-GGH
Eastern District of California,
Sacramento

ORDER

Before GIBSON,* BERZON, and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Berzon and Bea have voted to deny the suggestion for rehearing en banc, and Judge Gibson so recommends.

The suggestion for rehearing en banc has been circulated to the full court, and no judge has

* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed R. App P. 35(b). The petition for panel rehearing and the suggestion for rehearing en banc denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 03 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

ROBERT EVERETT JOHNSON,

Petitioner - Appellant,

v.

CLAUDE E. FINN; BILL LOCKYER, Attorney General,

Respondents - Appellees.

No. 07-55377

D.C.No.CV-05-0385-GGH

MEMORANDUM*

Appeal from the United States District Court
For the Eastern District of California
David F. Levi, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3

**The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Argued and Submitted September 24, 2007
Submission Vacated July 16, 2010
Resubmitted September 2, 2010
San Francisco, California

Before: GIBSON,** BERZON, and BEA, Circuit Judges.

California state prisoner Robert E. Johnson appeals from the district court's judgment that denied his 28 U.S.C. § 2254 habeas petition. In 1977, Johnson pleaded guilty to murder in the first degree in violation of California Penal Code § 187. He was sentenced to seven years to life in prison with the possibility of parole.[1] In 2001, the California Board of Parole Hearings ("Board") granted Johnson parole, but California Governor Grey Davis reversed the Board's decision. After Johnson's state habeas petitions were denied by the San Diego County Superior Court, California Court of Appeal, and California Supreme Court, Johnson filed a federal habeas corpus petition, which was denied by the district court. We have jurisdiction under 28 U.S.C. § 2253. We reverse and remand.

Johnson contends the Governor's denial of parole violated Johnson's rights under the Due Process Clause of the Fourteenth Amendment because there was not "some evidence" of his future dangerousness to support the Governor's denial of parole. "'[S]ome

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[1] The parties disagree about the length of Johnson's sentence. The State contends Johnson is serving a sentence of twenty-five years to life, while Johnson contends he is serving a sentence of seven years to life. This dispute does not affect our analysis because Johnson has already served more than twenty-five years in prison. Thus, for the purpose of this memorandum disposition, we assume Johnson was sentenced to seven years to life.

evidence' of future dangerousness" is a "*sine qua non* for denial of parole in California." *Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010) (en banc) (citations omitted). A "prisoner's aggravated offense does not establish current dangerousness 'unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state' supports the inference of dangerousness." *Id.* (quoting *In re Lawrence*, 190 P.3d 535, 555 (Cal. 2008)). When a state court denies habeas relief to a state prisoner who was denied parole based solely on the circumstances of his commitment offense, the prisoner is entitled to a writ of habeas corpus on the ground that "the state court decision was based on an unreasonable determination of the facts in light of the evidence." *Cooke v. Solis*, 606 F.3d 1206, 1216 (9th Cir. 2010) (citation and internal quotation marks omitted); *see* 28 U.S.C. § 2254(d)(2).

Here, the last reasoned state court decision—the decision of the California Court of Appeal—denied Johnson's state habeas claim on the ground that the circumstances of the commitment offense—the fact it was premeditated, callous, and heinous—provided some evidence to support the Governor's conclusion that Johnson "would represent an unreasonable threat to public safety if released." But the circumstances of the commitment offense "cannot, standing alone, constitute the requisite evidence of current dangerousness." *Cooke*, 606 F.3d at 1216.

The Governor provided two additional reasons for the denial of parole: (1) Johnson's "unstable social history," and (2) his failure "to take full responsibility for his role" in the murder. However, these reasons, to the extent they are supported by the record, are

insufficient to provide some evidence of current dangerousness.

First, the Governor found Johnson "ha[d] an unstable social history" based on his history of drug and alcohol abuse, turbulent home life, and behavioral problems that required psychological treatment. Johnson admitted at his parole hearing that he had a drinking problem at the time of the murder. However, Johnson also had been attending Alcoholics Anonymous for ten years at the time of his parole hearing. There was no evidence he still had a drinking problem or that he was likely to develop a drinking problem if he were released. The only evidence of drug use was Johnson's testimony that he had experimented with marijuana when he was 12 or 13 years old. That alcohol and drug use evidence does not support an inference that Johnson was dangerous thirty years later. With respect to Johnson's turbulent home life, Johnson's father was an abusive alcoholic who left his family when Johnson was young and Johnson's mother remarried another alcoholic who was shot and killed when Johnson was 14 years old. But Johnson's turbulent home life as a child and adolescent is not evidence of his current dangerousness. Finally, there is no evidence in the record that Johnson required psychological treatment as a juvenile. Thus, the conclusion that Johnson has an "unstable social history" is not based on "some evidence" of his current dangerousness.

Second, the Governor explained that Johnson, at his 2001 parole hearing, "attempted to minimize his culpability by stating that he thought it was 'like a game' and that he 'didn't believe any of it would happen.'" But Johnson's statements were not an attempt to minimize his culpability; he was describing how he felt at the time he committed the

crime in response to a specific question from a member of the Board. As the Board explained, "[Johnson] shows signs of remorse. He has indicated that he understands the nature and the magnitude of the offense and accepts responsibility for the criminal behavior and has a desire to change towards good citizenship." Thus, the Governor's finding that Johnson failed "to take full responsibility for his role" in the murder is unsupported by the record. Therefore, we reverse the district court and remand with instructions to grant the writ.[2]

REVERSED and REMANDED.

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[2] In light of our holding that Johnson is entitled to habeas relief based on the Governor's denial of parole without some evidence of future dangerousness, we need not reach the other claims Johnson raises on appeal.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FILED
December 6, 2010
CLERK, U.S.
DISTRICT COURT
Eastern District of
California
By /s/ DEPUTY

UNITED STATES OF AMERICA, Plaintiff,	)Case No. 2:05CVV00385-)JAM-GGH))
v.	))ORDER FOR RELEASE
ROBERT EVERETT JOHNSON, Defendant.	)OF PERSON IN)CUSTODY)

TO: United States Marshal:

This is to authorize and direct you to release ROBERT EVERETT JOHNSON, Case No. 2:05CVV00385-JAM-GGH, Charge __, from custody subject to the conditions contained in the attached "Notice to Defendant Being Released" and for the following reasons:

__ Release on Personal Recognizance
__ Bail Posted in the Sum of $__
__ Unsecured Appearance Bond
__ Appearance Bond with 10% Deposit
__ Appearance Bond with Surety

___ Corporate Surety Bail Bond
√ (Other) Pretrial conditions as stated on the record.

Issued at Sacramento, CA on December 6, 2010 at 11:08 a.m.

/s/ Gregory G. Hollows
Gregory G. Hollows
United States Magistrate Judge

Copy 5 - Court

Case 2:05-cv-00385-JAM-GGH Document 67 Filed 11/23/10

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Plaintiff,	)No. CIV S-05-0385 DFL)GGH P))
vs.	)
CLAUDE E. FINN, WARDEN, et al. Defendants.	)ORDER & WRIT OF)HABEAS CORPUS))

Robert Everett Johnson, inmate no. B88644, necessary and material to proceedings in this case, is confined in Avenal State Prison in the custody of James D. Hartley, Warden; in order to secure this inmate's attendance it is necessary that a Writ of Habeas Corpus issue commanding the custodian to produce the inmate in Court, 13th floor, Courtroom #9, United States Courthouse, 501 I Street, Sacramento, California as soon as practicable, and in no event later than December 6, 2010, at 10 a.m.

ACCORDINGLY, IT IS ORDERED that:

1. A Writ of Habeas Corpus, under the seal of this court, commanding the Warden to produce the inmate named above in United States District Court at the time and place above, and from day to day until completion of court proceedings or as ordered by the court.

2. The custodian is ordered to notify the court of any change in custody of this inmate and is ordered to provide the new custodian with a copy of this writ; and

3. The Clerk of the Court is directed to serve a courtesy copy of this order and writ of habeas corpus on the Out-To-Court Desk, Avenal State Prison - P.O. Box 8, Avenal, California 93024.

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

To: The Warden/or Sheriff of name and address of institution:

WE COMMAND you to produce the inmate named above before the United States District Court at the time and place above, and from day to day until completion of the proceedings or as ordered by the court.

FURTHER, you have been ordered to notify the court of any change in custody of the inmate and have been ordered to provide the new custodian with a copy of this writ.

DATED: November 22, 2010

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF CALIFORNIA

Case 2:05-cv-00385-JAM-GGH Document 66 Filed 11/22/10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Petitioner,	)	Case No. CIV S-05-0385-DFL GGH
	)	ORDER
v.	)	
CLAUDE E. FINN, et al., Respondent.	)	

The issue before the court is how to comply with a Ninth Circuit directive regarding the release and supervision of a prisoner who, in federal habeas corpus proceedings, successfully challenged a 2001 gubernatorial reversal of his grant of parole.

On September 3, 2010, the United States Court of Appeals for the Ninth Circuit instructed the district court to grant petitioner's writ of habeas corpus pursuant to 28 U.S.C. § 2254. However, the circuit court has yet to issue a mandate or fully relinquish jurisdiction of the matter. Rather, on November 9, 2010, the Ninth Circuit ordered that "[r]espondents' motion to stay the mandate is granted temporarily. We remand this case on a limited basis and direct the district court to set the conditions of Appellant's release so that he may be located and reincarcerated should the Supreme Court reverse the

panel's judgment." The Ninth Circuit further ordered that "[t]he Clerk shall issue the mandate seven days after the district court issues its order setting the conditions of release." (Doc. 60.)

On November 12, 2010, the undersigned ordered the parties to appear before the court to fashion conditions of petitioner's release. (Doc. 61.) On November 19, 2010, the parties filed "Stipulated Conditions of Release" providing for petitioner to be released to the United States Marshall, Pretrial Services Agency, under various conditions, including residency in a transitional living program in San Francisco, California. (Doc. 62.) Also on that date, the parties appeared before the undersigned to discuss the proposed conditions of release, and particularly the issue of which agency – state or federal – should be charged with petitioner's supervision in the interim period while any petition by respondents for grant of certiorari by the United State Supreme Court is pending in this matter.

The undersigned admits to some confusion as to what the Ninth Circuit has directed the district court to do in its "limited remand." As no mandate from that court has issued, and indeed will not issue until after the district court "set[s] conditions of release," there is some question as to whether the district court currently has jurisdiction to order petitioner's release pursuant to such conditions. (See Doc. 60.) Yet, the undersigned does not believe that the Ninth Circuit intended this court to file an order simply directing petitioner, upon release, to report to his state parole officer and fulfill the usual terms and conditions of parole, because in that case there would have been no reason for the Ninth Circuit to refrain from issuing the mandate at the same time as its directive. The Ninth Circuit, by its words, must have

intended *federal* supervision after petitioner was released, at least until the end of proceedings in the Supreme Court.

Moreover, the undersigned does not believe that the Ninth Circuit was ordering the fashioning of terms and conditions of release for a seven day period prior to the issuance of the mandate, only to have those terms and conditions immediately lapse in favor of state parole conditions when petitioner was actually released. Such a fashioning of federal conditions would be, in that case, a completely idle act, i.e., the federal conditions would never actually come into effect.

For example, after the grant of a writ invalidating a conviction, if a custodian were ordered to commence criminal proceedings within 60 days or release petitioner, a typical order in a habeas grant, it is beyond the undersigned's jurisdictional experience to fashion the precise terms and conditions (procedures) for those criminal proceedings. The criminal proceedings would proceed according to state law.

On the other hand, the court's jurisdiction to fashion "parole" terms and conditions upon release normally would expire at the time the mandate is issued. The court can generally order the release of a petitioner, but this is usually subject in the vast majority of cases to the complementary or alternative institution of appropriate state procedures – here, state parole upon release. And it is very unusual, if not jurisdictionally prohibited, for the federal hand to hover over those state procedures. The limited role of

the federal court does not encompass fashioning the terms and conditions of petitioner's parole/release requirements under state law.[1]

Ultimately, although unusual, the undersigned concludes that the circuit court did not remand as an idle act, but intended the district court's limited jurisdiction to encompass the ability to order petitioner's release, subject to conditions such as would allow him to "be located and reincarcerated should the Supreme Court reverse the panel's judgment." (Id.) The undersigned interprets this to mean that petitioner is to be released under federal supervision until such time as his federal habeas proceedings are completely put to rest – i.e., until respondents decline to file for writ of certiorari within the prescribed period; or until the United States Supreme Court denies the writ; or until the Supreme Court, having granted the writ, issues a decision in this matter. Thus, the undersigned will order that petitioner be released, subject to the conditions stipulated by the parties and such additional conditions as set forth below.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner Robert Everett Johnson is ordered released, subject to the Parties' Stipulated Conditions of Release (Doc. 64, Attachment 1) as of the date he appears in the courtroom of the undersigned, and in

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[1] For example, after the grant of a writ invalidating a conviction, if a custodian were ordered to commence criminal proceedings within 60 days or release petitioner, a typical order in a habeas grant, it is beyond the undersigned's jurisdictional experience to fashion the precise terms and conditions (procedures) for those criminal proceedings. The criminal proceedings would proceed according to state law.

no event later than December 6, 2010; the undersigned will issue a writ commanding his appearance in a separate document.

2. Pursuant to the Stipulated Conditions, petitioner will report in person to the Pretrial Services Agency on the first working day following his release from custody.

3. The Parties' Stipulated Conditions of Release shall remain in effect until either: respondents fail to file a petition for writ of certiorari by the deadline of January 18, 2011; or the United States Supreme Court issues a denial of writ of certiorari; or the United States Supreme Court issues a decision in this matter pursuant to a grant of certiorari. Respondents are to keep the court apprised as to when any of the above events occur.

4. The Clerk of Court is directed to serve copies of this Order and the Parties' Stipulated Conditions of Release (Doc. 64, Attachment 1) on the United States Court of Appeals for the Ninth Circuit, Case No. 06-17402.

5. The Clerk of the Court is directed to serve a courtesy copy of this order on the Out-To-Court Desk, Avenal State Prison - P.O. Box 8, Avenal, California 93024.

DATED: November 22, 2010 /s/ Gregory G. Hollows

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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Case 2:05-cv-00385-JAM-GGH Document 61 Filed 11/12/10

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Plaintiff,	)No. CIV S-05-0385 DFL GGH P))
vs.	))
CLAUDE E. FINN, WARDEN, et al. Defendants.	)ORDER))

On November 9, 2010, the United States Court of Appeals for the Ninth Circuit remanded this case on a limited basis and directed the district court to "set the conditions of petitioner's release so that he may be located and reincarcerated should the Supreme Court reverse the panel's judgment."

Accordingly, IT IS HEREBY ORDERED that the parties shall appear before the undersigned on November 19, 2010 at 2:00 p.m. to fashion the conditions of petitioner's release.

DATED: November 12, 2010

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF CALIFORNIA

Case 2:05-cv-00385-DFL-GGH Document 48 Filed 10/02/06

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON,	)Case No. 2:05CVV00385-)JAM-GGH)
v.	)JUDGMENT IN A)CIVIL CASE
Claude E. Finn,	)

XX—Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 10/2/2006

Victoria C. Minor
Clerk of the Court

ENTERED: October 2, 2006

By: */s/ L. Reader*
Deputy Clerk

Case 2:05-cv-00385-DFL-GGH Document 47 Filed 10/02/06

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Petitioner,	)Case No. 2:05CVV00385-)JAM-GGH))ORDER
vs.	))
Claude E. Finn, et al., Respondents.	)))

Petitioner, a state prisoner proceeding through counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On June 5, 2006, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the

findings and recommendations to be supported by the record and by proper analysis.

In addition to the magistrate judge's analysis as to the fourth claim, the court notes that petitioner's claim that Governor Davis's decision violated his plea agreement is similar to his claim that the decision violated the Ex Post Facto Clause. Both claims lack merit under Johnson v. Gomez, 92 F.3d 964 (9th Cir. 1996). Petitioner's Eighth Amendment claim also fails. Petitioner claims that the sentence serves no penological purpose. However, one of the purposes of imprisonment is punishment. See Cal. Penal Code § 1170(a). Moreover, although petitioner has served many years in prison, the time he has served is not disproportionate to the horrific crime for which he has been imprisoned.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 5, 2006, are adopted; and,

2. The petition for habeas corpus is DENIED.

DATED: 9/29/2006

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

Case 2:05-cv-00385-DFL-GGH Document 43 Filed 06/05/2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Petitioner,	)	Case No. CIV S-05-0385-DFL GGH
	)	ORDER AND FINDINGS AND RECOMMENDATIONS
v.	)	
CLAUDE E. FINN, et al., Respondent.	)	

Petitioner is a state prisoner proceeding through counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1977 petitioner was convicted in Dan Diego County of first degree murder and sentenced to life with the possibility of parole. In the instant petition, petitioner challenges the December 2001 decision by former Governor Gray Davis to reverse the August 2001 decision by the California Board of Prison Terms (BPT) finding him suitable for parole. The 2001 hearing was petitioner's twelfth suitability hearing.

This action is proceeding on the amended petition filed July 19, 2005, which challenges the Governor's decision to reverse the BPT on the following grounds: 1) the decision lacked individualized consideration; 2) the decision was made pursuant to an illegal "no parole" policy; 3) the decision was not supported by

some evidence; 4) the decision violated petitioner's plea agreement; 5) the decision violated the Ex Post Facto Clause and constituted a bill of attainder; 6) petitioner's continued incarceration violates the Eighth Amendment.

On January 19, 2006, the undersigned recommended that the petition be granted on grounds that the Governor's decision to reverse the 2001 decision by the BPT finding petitioner suitable for parole violated due process because the decision was not supported by some evidence. Specifically, the undersigned found that contrary to Biggs v. Terhune, 334 F.3d 910,913 (9th Cir. 2003), the Governor relied on an unchanging parole eligibility factor in determining that parole should be denied because of the seriousness of the crime. In the January 19, 2006, findings and recommendations, the undersigned declined to address petitioner's remaining claims. See Phillips v. Vasquez, 56 F.3d 1030, 1036 (9th Cir. 1995), citing Blazak v. Ricketts, 971 F.2d 1408 (9th Cir. 1992) (where appropriate, district courts may decline to address all claims raised in a habeas corpus petition).

On March 31, 2006, the Honorable David F. Levi declined to adopt the findings and recommendations. While Judge Levi agreed with this court that petitioner has a liberty interest in parole, he disagreed with the standard applied by this court in finding a violation of petitioner's due process rights. Judge Levi found that under In re Dannenberg, 34 Cal.4th 1061 (2005), petitioner had a liberty interest which required that the Governor find, based on some evidence, that there were aggravating factors in the crime that went beyond the minimum elements of the crime which suggested that petitioner remained a danger to public safety. March 31, 2006, Order, p. 2:

20-23. Judge Levi found that in the instant case, "[t]here is no question that such aggravating factors exist here." Id., p. 2: 23. Judge Levi then referred this action to the undersigned for such further proceedings as may be appropriate.

Because under In re Rosencrantz, 29 Cal. 4th 616, 682 (2002), a finding that the seriousness of the crime resulting in incarceration may by itself warrant a denial of parole eligibility, and because Judge Levi found that the Governor's decision to reverse the BPT was supported by sufficient evidence with respect to this eligibility factor, the issues that remain to be decided are those that the undersigned declined to address in the January 19, 2006, findings and recommendations. The court will now address these issues.

Petitioner argues that the Governor's decision lacked individualized consideration. As stated in the January 19, 2006, findings and recommendations, this claim appears to be encompassed by his claim alleging insufficient evidence. Accordingly, the court will not separately address this claim.

Petitioner argues that the Governor's reversal of parole pursuant to Cal. Penal Code § 3041.2 violated the Ex Post Facto Clause. In Johnson v. Gomez, 92 F.3d 964 (9th Cir. 1996), the Ninth Circuit held that Cal. Penal Code § 3041.2, authorizing the Governor to grant or deny parole, does not violate the Ex Post Facto Clause. Petitioner argues that since Johnson, the United States Supreme Court issued a decision that changes the analysis regarding ex post facto laws, i.e. Gamer v. Jones, 529 U.S. 244, 120 S. Ct. 1362 (2000). See also In re Rosencrantz, 29 Cal. 4th 616, 637-652 (2002).

In Garner, a Georgia inmate challenged a retroactive administrative adjustment of the period

between parole reviews under the Ex Post Facto Clause. The Supreme Court held that the Eleventh Circuit's analysis failed to reveal conclusively whether or not the retroactive change in time period violated the Clause, and also provided detailed guidance for how such claims should be resolved in the future. Garner did not address the issue of whether a law authorizing a governor to grant or deny parole violates the Ex Post Facto Clause. Accordingly, this court will follow the Ninth Circuit's decision in Johnson v. Gomez. Pursuant to Johnson, this claim should be denied.

Petitioner also argues that the § 3041.2 constitutes an illegal bill of attainder. This claim is without merit. See Nixon v. Administrator, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803 (1977) (defining bill of attainder as an act of legislative outlawry that imposes disabilities on an individual on account of his misconduct, but without a trial).

Petitioner claims that the Governor's decision to reverse the BPT violates his plea agreement. Petitioner claims that when he pled guilty, he understood that he would be released when the BPT found him suitable for parole. Petitioner also argues that his continued incarceration violates the Eighth Amendment. These two claims, in essence, argue that petitioner's sentence has been converted from life with parole to life without parole. While continuous reliance on the seriousness of the crime may lead to such a de facto result, such a claim is encompassed by petitioner's claim challenging the sufficiency of the evidence of the Governor's decision to reverse the BPT. For the reasons discussed above, these claims should be denied.

Finally, petitioner argues that he has been denied parole pursuant to a no-parole policy. The

California Supreme Court rejected such a claim in In re Rosenkrantz, 29 Cal.4th 616, 128 Cal. Rptr. 2d 104 (2002). More importantly, because some evidence existed to support the Governor's decision reversing the BPT, the issue of whether a no-parole policy existed is moot. Accordingly, this claim should be denied.

On April 18, 2006, petitioner filed a motion for discovery regarding his ex post facto and no parole policy claims. Because the court recommends that these claims be denied for the reasons discussed above, petitioner's motion for discovery is denied.

Accordingly, IT IS HEREBY ORDERED that petitioner's April 18, 2006, motion for discovery is denied;

IT IS HEREBY RECOMMENDED that petitioner's claims not previously addressed be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: *6/2/06*

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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Case 2:05-cv-00385-JAM-GGH Document 35 Filed 03/31/06

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Petitioner,	)	Case No. CIV S-05-0385-DFL GGH P
v.	)	ORDER
CLAUDE E. FINN, et al., Respondent.	)	

Petitioner, a state prisoner proceeding through counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On January 19, 2006, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Respondent has filed objections to the findings and recommendations. Petitioner has responded to the objections.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having

carefully reviewed the entire file, the court does not adopt the findings and recommendations.

For the reasons expressed more fully below, the court agrees that there is a liberty interest in parole under the California parole scheme. The more important question, however, is: what is the extent of that liberty interest? This question is answered in In re Dannenberg, 34 Cal.4th 1061 (2005). In Dannenberg the California Supreme Court clarified that under the California parole statute, Penal Code § 3041, the parole authority "exercising its traditional broad discretion, may protect public safety *in each discrete case* by considering the dangerous implication of a life-maximum prisoner's crime individually." To deny consideration for parole, the parole authority "must point to factors beyond the minimum elements of the crime for which the inmate was committed." If there is "some evidence" of such factors, the parole authority "need engage in no further comparative analysis before concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner's release." Id. at 421. See id. at 805 (Parole Board acts lawfully by "pointing to some evidence that the particular circumstances of his crime – circumstances beyond the minimum elements of his conviction – indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he remains a danger to public safety."). The Dannenberg court further noted that such an interpretation of the state parole scheme would not deprive indeterminate life prisoners of all relief: Under the "cruel or unusual punishment" clause of the State Constitution, art. I, section 17, prisoners may seek release by writ of habeas corpus where continued confinement has

become constitutionally excessive under state constitutional law.

In sum, under Dannenberg, petitioner here has a liberty interest which requires that the Governor find, based on some evidence, that there are aggravating factors in the crime that go beyond the minimum elements of the crime, which suggest that the petitioner remains a danger to public safety. There is no question that such aggravating factors exist here.

The decision in Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003), is not contrary to the analysis above. Biggs was decided prior to Dannenberg and did not have the benefit of that decision. Further, the Biggs court anticipated the holding in Dannenberg by finding that the parole board acted properly in denying Biggs parole based on § 3041(b) and factors present in the commission of the offense that went beyond the minimum elements of the crime. In what is fairly described as dicta, the Biggs court noted that at some point in the future, if Biggs were denied parole for this reason, "serious questions" would be raised concerning the constitutionality of such a denial. The court did not hold that there would be a due process violation but only that there "could" be a due process violation. Given that the state also provides for relief in cases in which, in light of individual circumstances, continued incarceration may result in excessive punishment, it is possible that the federal courts will have no occasion to consider the due process issue posed in Biggs.

Given the narrow liberty interested created by state law, as explained by Dannenberg, the court cannot hold that the state court decision here is "contrary to" or an "unreasonable application of clearly established Federal law, as determined by the

Supreme Court of the United States." 28 U.S.C. § 2254(d).

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed January 19, 2006, are not adopted; and,

2. The matter is referred to the magistrate judge for such further proceedings as may still be appropriate.

DATED: 3/31/2006

/s/ David F. Levi

DAVID F. LEVI
UNITED STATES DISTRICT JUDGE

Case 2:05-cv-00385-DFL-GGH Document 32 Filed 01/19/2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT EVERETT JOHNSON, Petitioner,	)	Case No. CIV S-05-0385-DFL GGH
	)	ORDER AND FINDINGS AND
v.	)	RECOMMENDATIONS
CLAUDE E. FINN, et al., Respondent.	)	

I. Introduction

Petitioner is a state prisoner proceeding through counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1977 petitioner was convicted in San Diego County of first degree murder and sentenced to life with the possibility of parole. In the instant petition, petitioner challenges the December 2001 decision by former Governor Gray Davis to reverse the August 2001 decision by the California Board of Prison Terms (BPT) finding him suitable for parole. The 2001 hearing was petitioner's twelfth suitability hearing.

This action is proceeding on the amended petition filed July 19, 2005, which challenges the Governor's decision to reverse the BPT on the following grounds: 1) the decision lacked individualized consideration; 2) the decision was made pursuant to an illegal "no

parole" policy; 3) the decision was not supported by some evidence; 4) the decision violated petitioner's plea agreement; 5) the decision violated the Ex Post Facto Clause and constituted a bill of attainder; 6) petitioner's continued incarceration violates the Eighth Amendment.

Where appropriate, district courts may decline to address all claims raised in a habeas corpus petition. See Phillips v. Vasquez, 56 F.3d 1030, 1036 (9th Cir. 1995), citing Blazak v. Ricketts, 971 F.2d 1408 (9th Cir. 1992). After reviewing the record, the court has determined that it will only review petitioner's claim challenging the sufficiency of the evidence, because this claim has merit. The court declines to review the remaining claims for the following reasons.

Petitioner's claim alleging that the Governor's decision lacked individualized consideration appears to be encompassed by his claim alleging insufficient evidence. For that reason, the court declines to separately address this claim. Petitioner's claims that the Governor's decision violates his plea agreement and that his continued incarceration violates the Eighth Amendment may be more appropriately raised in the district where petitioner was convicted, i.e. the United States District Court for the Southern District of California, because these claims more directly concern the validity of his conviction. For this reason, the court declines to address these claims. The court declines to address petitioner's claim alleging that the Governor's decision was made pursuant to an illegal "no parole policy" because such a claim is problematic and most likely unmeritorious. See In re Rosenkrantz, 29 Cal.4th 616, 128 Cal. Rptr 104 (2002) (the California Supreme Court found no evidence of a "no parole" policy).

Finally, the court declines to address petitioner's claims that the Governor's decision violated the Ex Post Facto Clause and constituted an illegal bill of attainder because these claims are without merit. See Johnson v. Gomez, 92 F.3d 964 (9th Cir. 1996) (Cal. Penal Code § 3041.2, which authorizes the Governor to reverse BPT decisions to grant or deny parole, does not violate the Ex Post Facto Clause); see Nixon v. Administrator, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803 (1977) (defining bill of attainder as an act of legislative outlawry that imposes disabilities on an individual on account of his misconduct, but without a trial.).

On September 29, 2005, petitioner filed a motion for partial summary judgment as to his claim that the Governor's decision was not supported by some evidence. Petitioner's motion is vacated as unnecessary. On August 15, 2005, petitioner filed a motion for discovery. Petitioner seeks discovery regarding his claim concerning the alleged no-parole policy and his claim alleging violation of the Ex Post Facto Clause. Because the court declines to address these claims, the motion for discovery is denied as unnecessary.

After carefully reviewing the record, the court recommends that the petition by granted on the grounds that the Governor's decision to reverse the BPT was not supported by sufficient evidence.

II. Anti-Terrorism and Effective Death Penalty Act (AEDPA)

The Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this petition for habeas corpus which was filed after AEDPA became effective. Neely v. Nagle, 138 F.3d 917 (11th Cir.), citing Lindh v. Murphy, 117 S. Ct. 2059 (1997). The

AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in §2254(d). Justice O'Conner's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on, the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law.... [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law

erroneously or incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Viscotti, 537 U.S. 19,123 S. Ct. 357 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S. Ct. 362 (2002). Nevertheless, the state decision cannot-be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. Id. An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. Lockyer v. Andrade, 538 U.S. 63,75-76,123 S. Ct. 1166, 1175 (2003). Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. at 9, 123 S. Ct. at 366. However, where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

III. Discussion

A. Liberty Interest in Parole

At the outset, respondent argues that the petition should be denied because petitioner does not have liberty interest in parole. For the following reasons, the court finds that petitioner has a clearly established liberty interest in parole.

Although due process does not require the existence of a parole scheme, California has established one. Not all of the myriad procedures of the parole setting system are pertinent here. The court sets forth that part of the statutory section that is pertinent:

> (a) In the case of any prisoner sentenced pursuant to any provision of law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Prison Terms shall meet with each inmate during the third year of incarceration for the purposes of reviewing the inmate's file, making recommendations, and documenting activities and conduct pertinent to granting or withholding postconviction credit. One year prior to the inmate's minimum eligible parole release date a panel consisting of at least two commissioners of the Board of Prison Terms shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. The panel shall consist solely of commissioners or deputy commissioners from the Board of Prison Terms.

> The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the prisoner was sentenced and other factors 'in mitigation or aggravation of the crime.

Cal. Penal Code § 3041.

In compliance with the statutory mandate, the Board of Prison Terms issued regulations which guide it in finding prisoners convicted of life offenses with parole eligibility for parole setting. Cal. Code Regs. tit. 15, § 2402 sets forth the criteria for determining whether an inmate is suitable for parole. Section 2402(a) provides that regardless of the length of time served, a prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

Section 2402(c) sets forth the circumstances tending to show unsuitability. The court lists those of significance here:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

> (A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style manner.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

Section 2402(d) sets forth the circumstances tending to indicate suitability:

(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to the victims.

(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.
(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.
(4) Motivation for the Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.
(5) Battered Woman Syndrome ...
(6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.
(7) Age. The prisoner's present age reduces the probability of recidivism.
(8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.
(9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

The Ninth Circuit has held that California's parole scheme gives rise to a cognizable liberty interest in release on parole. Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003). Respondent argues that the California Supreme Court recently found that Cal. Penal Code § 3041 is not mandatory and does not create a presumption that parole will be

granted. In re Dannenberg, 34 Cal.4th 1061, 1084, 1087-88 (2005). Respondent argues that the California Supreme Court's decision in Dannenberg is not an unreasonable application of clearly established Supreme Court. Pursuant to Dannenberg, respondent argues that petitioner has no liberty interest in parole.

The undersigned must relate that a district judge of this court believes that the California parole scheme for indeterminate sentences does not create a federal liberty interest. Sass v. Cal. Board of Prison Terms, 376 F. Supp.2d 975 (E.D. Cal. 2005) (Honorable Morrison England). In Sass, Judge England found that no federal liberty interest was created because the wording of the parole statute, Cal. Penal Code 3041(a) ("a panel *shall normally* set a release date..) and §3041(b) ("the *panel...shall set* a release date...." was insufficiently mandatory. Judge England relied heavily on In re Dannenberg, 34 Cal. 4th 1061, 1098,23 Cal. Rptr. 3d 417, 443 (2005). However, even assuming that the "old" Supreme Court paradigm regarding creation of a liberty interest (mandatory act and underlying factual predicates) remains the analytical framework in which to judge the creation of right-to-parole liberty interests, see e.g., Board of Pardons v. Allen, 482 U.S. 369, 378, 107 S.Ct. 2415, 2421(1987) (mandatory language in a parole statute creates a "presumption of release" and gives rise to a liberty interest), California law, both before and after Dannenberg finds that the California parole scheme for indeterminate offenses does create a liberty interest.

> In sum, the governing statute provides that the Board *must grant parole* unless it determines that public safety requires a lengthier period of incarceration for the

> individual because of the gravity of the offense underlying the conviction. (Pen.Code, § 3041, subd. (b).) And as set forth in the governing regulations, the Board *must set a parole date* for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances enumerated in section 2402 of the regulations, that the prisoner is unsuitable for parole. (Cal.Code Regs., tit. 15, § 2401.) Accordingly, parole applicants in this state *have an expectation that they will be granted parole* unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.

In re Rosenkrantz, 29 Cal. 4th 616, 654, 128 Cal. Rptr. 2d 104, 138 (2003) (emphasis added).

It is difficult to conceive of words which, mirror the *requirements* of the Allen mandatory-act-in light-of-satisfied-factual-predicates paradigm more than the emphasized words of Rosenkrantz. Indeed, Allen and Rosenkrantz use the same terminology, i.e. "presumption" of release and "expectation" of release. These are the words of liberty interest creation. It is not material that great discretion is vested within the administrative agency granting parole. Allen supra. See also the post-Dannenberg case of In re DeLuna, 126 Cal. App. 4th 585, 591, 24 Cal. Rptr. 3d 643, 647 (2005):

> Penal Code section 3041, subdivision (b) requires the Board to "set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past

> convicted offense or offenses, is such that consideration of public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." *This statute creates a conditional liberty interest for a prospective parolee.* (Cf. Rosenkrantz, supra, 29 Cal.4th at p. 661, 128 Cal.Rptr.2d 104, 59 P.3d 174; McQuillion v. Duncan (9th Cir.2002) 306 F.3d 895, 901-902.) (emphasis added)[1]

The undersigned can only find that California law is in disarray on the subject of liberty interest created by the California parole statutes. Dannenberg did not overrule Rosencrantz, and implied overrulings are extremely disfavored. Scheiding v. Gen. Motors, 22 Cal. 4th 471,478,93 Cal. Rptr. 2d 342,346 (2000). Indeed, California cases after Dannenberg continue to find a liberty interest and cite Rosencrantz. Therefore, Biggs should not, and cannot, be cast aside based on the ambiguities in California law unless the Ninth Circuit so holds.[2]

For the reasons discussed above, the court finds that petitioner has a liberty interest in parole.

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[1] Dannenberg did find that California prisoners had no liberty interest in a *uniform* parole date, 34 Cal. 4th at 1098 (n.18), 23 Cal. Rptr. 3d at 443 (citing Rosenkrantz); however, this is a far cry from holding that the parole scheme as a whole does not create a conditional liberty interest.

[2] Other district court cases continue to find a liberty interest in the California parole statute after Sass. See Lewis v. Solis, 2005 WL 3454137 (N.D.Cal. 2005); Murilla v. Perez, 2005 WL 2592420 (C.D. Cal. 2005); Rodriguez v. Campbell, 2005 WL 1335711 (E.D. Cal. 2005 MCE JFM); but see Trevino v. Mendoza-Powers, 2005 WL 2436471 (E.D. Cal. 2005 (OWW SMS).

B. Insufficient Evidence/ Individual Consideration

Petitioner argues that in reversing the BPT's decision finding him suitable, the Governor failed to give petitioner individualized and full consideration regarding who he was at the time of the offense compared to who he is now. Petitioner separately argues that the Governor's decision is not supported by sufficient evidence. As far as this court can tell, these arguments encompass each other. Accordingly, they will be addressed below in the context of whether the Governor's decision was supported by sufficient evidence.

Under California law, in considering whether to reverse a decision by the BPT the Governor considers the same factors which the parole authority is required to consider. Cal. Const., art. V, § 8(b); Cal. Penal Code § 3041.2; In re Rosenkrantz, supra, 29 Cal.4th at p. 660, 128 Cal.Rptr.2d at 142. Accordingly, this court will apply the same standard used in evaluating the sufficiency of evidence to support decisions by the BPT in its evaluation of the sufficiency of evidence of the Governor's decision.

"In the parole context, the requirements of due process are met if 'some evidence' supports the decision [by the BPT]." Biggs v. Terhune, 334 F.3d 910,914 (9th Cir. 2003). The evidence underlying the board's decision must have some indicia of reliability. Id.

In Biggs, the Ninth Circuit indicated that a continued reliance on an unchanging factor such as the circumstances of the offense could result in a due process violation. Biggs was serving a sentence of twenty-five years to life following a 1985 first degree murder conviction. In the case before the Ninth Circuit, Biggs challenged the 1999 decision by the

BPT finding him unsuitable for parole despite his record as a 'model prisoner. 334 F.3d at 913. While the Ninth Circuit rejected several of the reasons given by the BPT for finding Biggs unsuitable, it upheld three: 1) petitioner's commitment offense involved the murder of a witness; 2) the murder was carried out in a manner exhibiting a callous disregard for the life and suffering of another; 3) petitioner could benefit from therapy. 334 F.3d at 913.

The Ninth Circuit cautioned the BPT regarding its continued reliance on the gravity of the offense and petitioner's conduct prior to the offense:

> As in the present instance, the parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of his offense would raise serious questions involving his liberty interest.

334 F.3d at 916.

The Ninth Circuit stated that "[a] continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." 334 F.3d at 917.

The court now examines the decisions by the BPT and the Governor. On August 19, 1991, the BPT found petitioner suitable for parole. Exhibit H attached to respondent's exhibit C. On October 18,

1991, Governor Wilson reversed this decision. Exhibit H, attached to respondent's Exhibit C. On August 20, 2001, petitioner had his twelfth subsequent parole suitability hearing. Exhibit D p. 5, attached to respondent's exhibit C. On December 13, 2001, Governor Davis reversed this decision. Exhibit C, attached to respondent's Exhibit C.

The facts of petitioner's commitment offense are summarized in the probation report, respondent's Exhibit G, as well as discussed at the 2001 hearing. Petitioner was seventeen years old at the time he committed the murder. Petitioner and his crime partner, Davis, schemed to find a man and woman couple to murder. They also planned to rape the woman. Petitioner speculated that Davis came up with this idea after a stranger attempted to rape Davis's girlfriend. On June 28, 1977, petitioner and Davis attempted to enact this plan, but the intended victims fled.

On July 3, 1977, petitioner and Davis drove to a park in Escondido and found the victim Michael Windsor and his girlfriend. Petitioner approached and ordered them out of their car. Windsor complied as petitioner kept a shotgun pointed at him. Windsor's girlfriend fled and petitioner shot and killed Windsor, rolled him on his back and took his keys and wallet. Davis took the weapon and shot at the girl. Petitioner and Davis left the park, but later returned to find the girl.

The Governor found petitioner unsuitable for parole because the offense was carried out in an execution style manner. Cal. Code Regs. tit. 15, § 2402(c)(1)(B) (that the offense was carried out in execution-style manner tends to demonstrate unsuitability). In particular the Governor found,

> After careful planning, Mr. Johnson committed an execution-style murder of a random 17-year-old boy. He committed this heinous crime in order to help his crime partner complete the kidnap, rape and murder of the victim's young female companion. His actions demonstrate a complete disregard for human life and suffering.

Exhibit C attached to respondent's exhibit C.

The characterization of petitioner's crime as an execution style-murder is accurate. However, as discussed above, the 2001 hearing was petitioner's twelfth suitability hearing. It had been 24 years since petitioner committed the murder. As found by the 2001 hearing panel, petitioner had done everything he could in prison to better himself. Under these circumstances, the nature of the offense had lost any predictive value and the continued reliance on it to find petitioner unsuitable violated- due process. Accordingly, the court finds that this factor was not supported by some evidence.

It would be easy to simply let the Governor's decision stand. The murder was extremely callous, insensitive and reflecting no respect for the value of human life. A sentence of life without parole could easily be justified on moral grounds. However, the prosecutor was unwilling or unable to proceed with special circumstances for a life without parole sentence, and petitioner, not charged or convicted with special circumstances, was sentenced to life *with the possibility of parole.* This remains the fact whether the Governor or this court agrees with the prosecutor's determination. California law therefore requires that there be some *meaningful* possibility of parole. Clearly, that sentence could not be

transformed into a life without parole sentence, but that, in effect, was what the Governor did by simply relying on the nature of the crime—twelve hearings having transpired. Whether made by express words or hidden design, a decision to never allow petitioner to be paroled is contrary to law.

As recognized by the BPT, the inhumanity of the murder will never change; it will not minimize in its shockingness over time. A later decision that the murder "wasn't so bad" will never be made, and if it were, such a decision would be clearly arbitrary. Therefore, if the Governor's decision to deny parole based on the nature of the crime is permitted to stand, contrary to the parole statutes which logically measure parole eligibility on the reformation of the prisoner after the proscribed period of punishment, parole eligibility is an impossibility, not a possibility. The parole statutes do not vest the Governor with the power to resentence petitioner.[3]

The remainder of the factors considered demonstrate conclusions, which on their face would stand as a basis for denying parole; however, when the evidentiary surface is scratched, there is simply a dearth of "some evidence" to support the conclusions. The 2001 panel found that petitioner posed no unreasonable risk of danger to society or threat to public safety if released from prison. Exhibit D, p. 55, attached to respondent's exhibit C. In support of this conclusion, the panel found that petitioner had no

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[3] Obviously, the seriousness of the crime had predictive value for the dangerousness of petitioner's release for the first, second, perhaps third suitability hearing. But as the years go by, this factor loses its predictive value in light of the growing experience to the contrary (assuming petitioner's record in prison is exemplary).

juvenile record of assaulting others. Id., Cal. Code Regs. tit. 15,§ 2402(d)(1) (lack of record of assaulting others as a juvenile demonstrates suitability). The panel also found that petitioner's institutional behavior indicated an enhanced ability to function within the law upon release. Id., Section 2402(d)(9) (institutional activities demonstrate suitability). In support of this finding; the panel observed that petitioner had obtained AA and AS. degrees while incarcerated and was 30 units short of a B.A degree. Id. In addition, petitioner had continuously participated in self-help and therapy programming. Id. Petitioner had obtained vocational programming including a license to be an air frame engine mechanic certified by the FAA. Id., p. 56. In addition, two psychiatric reports were in favor of petitioner's release on parole. Id., p. 56.

The panel found that petitioner lacked a significant criminal history. Id. p. 6; § 2402(d)(6) (lack of significant criminal history of violent crime demonstrates suitability). The panel found that petitioner's advanced age reduced his probability of recidivism. Id. p. 56; § 2402(d)(7) (prisoner's present age reduces probability of recidivism). The panel also found that 2 petitioner had realistic parole plans which included a job and family support in the Bakersfield area. Id. p. 56; section 2~02(d)(8) (realistic parole plans demonstrate suitability). In addition, the panel found that petitioner showed signs of remorse. Id. p. 56; § 2402(d)(3) (indication of remorse demonstrates suitability).

In conclusion, BPT Commissioner Daly told petitioner, "I think that you've done a very good job. You know, when you were 17, I don't think there's any way you'll ever get around that being a horrible, horrible crime. But I do think that you have done

everything that you can to better yourself." Id., p. 59.

In reversing the 2001 decision by the BPT, the Governor found petitioner unsuitable on the following grounds. First, he found that petitioner had an unstable social history. Cal. Code Regs. tit. 15, § 2402(c)(3) (unstable social history tends to show unsuitability). In particular, the Governor stated:

> According to Mr. Johnson, he had a turbulent home life and behavioral problems that required psychological treatment. He began experimenting with marijuana at age 12 and seriously abusing alcohol at age 16. Mr. Johnson's substance abuse led to two arrests for being a minor in possession of alcohol. Mr. Johnson stated that he had also been stopped by police several times for driving while under the influence, but was never arrested or charged. He stated that he had been drinking heavily during the 48 hours immediately prior to the murder.

Exhibit C, attached to respondent's exhibit C.

In finding that petitioner had an unstable social history, the Governor relied heavily on petitioner's drinking problem. At the 2001 hearing, petitioner admitted that he had a drinking problem at the time of the offense. Exhibit D p. 13 attached to respondent's exhibit C. At the 2001 hearing, the BPT acknowledged that petitioner had been attending Alcoholics Anonymous (AA) since 1991. Exhibit D p. 23, attached to respondent's exhibit C. That petitioner had a drinking problem as a juvenile was never going to change. The Governor did not find that petitioner had a current drinking problem, apparently based on petitioner's ten year attendance of AA. Under these circumstances, using the

unchanging factor of petitioner's drinking problem to find him unsuitable for parole violated his right to due process.

The Governor also found that petitioner had an unstable social history based on his use of marijuana. At the 2001 hearing, petitioner testified that he experimented with marijuana when he was 13 but that he did not like it so he did not "mess" with it. Exhibit D, p. 22, attached to respondent's exhibit C. This limited use of marijuana was not "some evidence" in support of the Governor's finding that petitioner had an unstable social history.

The Governor also found that petitioner had an unstable social history based on his turbulent home life. At the 2001 hearing, petitioner testified that his father left his family when he was little. Exhibit D p. 16, attached to respondent's exhibit C. Petitioner had contact with his father when he got to be around 15 or 16 years old. Exhibit D p. 17, attached to respondent's exhibit C. Petitioner testified that his current relationship with his siblings could be better if they were not alcoholics. Exhibit D p. 19, attached to respondent's exhibit C. Petitioner had also dropped out of school in the ninth grade. Exhibit D p. 20, attached to respondent's exhibit C.

Petitioner was obviously not responsible for his father leaving the family when he was young. Nor was petitioner responsible for the alcohol abuse of his siblings. For these reasons, the Governor inaccurately characterized these circumstances as demonstrating an unstable social history by petitioner. That petitioner dropped out of school also did not support a finding that petitioner had a history of unstable or tumultuous relationships with others. The court is unsure of the basis for the

Governor's statement that petitioner required psychological treatment as a juvenile.

For the reasons discussed above, the court finds that the Governor's finding that petitioner had an unstable social history was not supported by some evidence.

Finally, the Governor found that petitioner had not taken sufficient responsibility for his crime:

> Mr. Johnson has yet to take full responsibility for his role in this vicious crime. At the August 2001 parole suitability hearing, Mr. Johnson attempted to minimize his culpability by stating that he thought it was "like a game" and that "I didn't believe that any of it would happen." Mr. Johnson has made similar comments in the past. However, the facts indicate that Mr. Johnson affirmatively carried out the crime exactly as it had been planned. He was holding the shotgun and could have stopped the crime at any time. Once the victim had been shot, Mr. Johnson callously rifled through the victim's pockets while he was still moving. Mr. Johnson attempted to commit an identical crime just a week earlier. I believe Mr. Johnson lacks insight into his own criminality and requires additional counseling to better understand the magnitude of his offense and the causative factors leading to it.

Exhibit C attached to respondent's exhibit C.

At the 2001 hearing, petitioner told the panel that at the time of the crime, committing it seemed like a game and he did not think it would happen:

> Commissioner Moore: You said it was kind of a game when you completed these crimes. How do you feel, what was the, you know, the process with that is what he asked?
> Petitioner: Like I said in the beginning, it didn't, I didn't think that any of it was going to happen in the first place. And everything leading up to it was, it almost seemed impossible to happen, and all the things that, I mean, it was almost like a game. It was like he was pushing me and I was pushing him, we were seeing how far one another would go. I didn't think you know, that we would actually go as far as we did. Maybe that was a bad choice of words on my part but, I mean, I didn't see any, any conclusion to what we were, what we had planned to do.

Exhibit D, pp. 43-44 attached to respondent's exhibit C.

Petitioner's statements that committing the crime seemed like a game and that he did not think it would happen was 'not an attempt by him in 2001 to minimize his culpability for the crime. Rather, in making these statements, petitioner was obviously attempting to describe what he felt at the time of the crime. Petitioner was not stating presently that he believed murder plots were a game, or that life exists in some video game meaninglessness.

During the 2001 hearing, petitioner did not in any way deny or attempt to minimize his culpability for the crime. Petitioner told the panel that he felt ashamed for what he did, and that he felt bad that he had taken the victim away from his family. Exhibit D, p. 8 attached to respondent's exhibit C. Petitioner

told the panel that he had attempted to make amends by changing himself. Exhibit D, p. 9 attached to respondent's Exhibit C. Petitioner told the panel that he was more mature, that he thought for himself, and he knew the difference between right and wrong. Exhibit D p. 9 attached to respondent's Exhibit C.

Finally, the Governor found that petitioner required additional therapy to gain a better understanding of the magnitude of his offense. The BPT relied on two psychological reports in finding petitioner suitable for parole. The first report, prepared in 1999, stated that petitioner should be expected to "deepen his ethical and moral self-awareness, and to expand his understanding of the impact of the crime on the victims and their families. Johnson might consider for example, learning more about different religions and their ideals of right and wrong, and continuing in self-help groups." Respondent's Answer, Exhibit I. This report also stated that petitioner appeared to "accept and to know that taking another's life was wrong. There appears some degree of remorse for the act." The second psychological report, dated August 2001, is an addendum to the earlier report. Id. This report stated that petitioner exhibited no psychiatric pathology and concluded,

> Now, 24 years later, the subject is observed as having demonstrated the ability to plan and reach goals that are within societies mores. Violence potential, in the state of sobriety, is evaluated as average for the male in the free community. When released, the Subject should continue Alcoholics Anonymous, abstain from alcohol and related drugs, and fulfill his

> affiliation needs through social interaction within groups that are positive and law abiding.

Id.

At the 2001 hearing, the panel also mentioned an addendum dated September 16, stating that petitioner demonstrated significant positive change in the area of moral and ethical self-awareness compared to the earlier report. Exhibit D p. 28 attached to respondent's exhibit C. It is unclear to this court whether the September 16 addendum referred to by the panel is the addendum referred to immediately above. In any event, both of petitioner's latest psychological evaluation supported the suitability finding. Neither report stated that petitioner required additional therapy. Under these circumstances, the Governor's conclusion that petitioner required additional therapy to better understand the magnitude of his offense was not supported by some evidence.

For the reasons discussed above, this court concludes that the Governor's decision to reverse the 2001 BPT's finding of parole suitability was not supported by some evidence. Because the denial of this claim by the California Supreme Court was not a reasonable application of clearly established Supreme Court authority, the petition should be granted as to this claim.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's August 15, 2005, motion for discovery is denied as unnecessary;

2. Petitioner's September 29, 2005, summary judgment motion is vacated;

IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be granted on grounds that the Governor's decision to

reverse the 2001 decision by the Board of Prison Terms finding petitioner suitable for parole was not supported by some evidence; petitioner be given a release date, assuming his prison record has remained materially unchanged since the 2001 suitability hearing. These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated 1/19/06

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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S126439

Supreme Court
FILED
JAN 12 2005
Frederick K.
Ohlrich Clerk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA
En Banc

In re ROBERT JOHNSON on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

Brown, J., was recused and did not participate.

/s/ GEORGE
Chief Justice

COURT OF APPEAL — FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FILED
Stephen M. Kelly,
Clerk
OCT — 7 2003
Court of Appeal Fourth
District

In re ROBERT JOHNSON	D041899
on	San Diego County Super. Ct. No. CRN 487001
Habeas Corpus.	

THE COURT:

The petition for writ of habeas corpus, response and reply have been read and considered by Presiding Justice McConnell and Associate Justices Haller and McDonald.

Robert Johnson pleaded guilty to first degree murder in 1977 and the court sentenced him to prison for seven years to life, plus two years for a firearm use enhancement. In 1991 the Board of Prison Terms (Board) found Johnson suitable for parole. That decision was reversed by former Governor Pete Wilson. In 2001 the Board again found Johnson suitable for parole. That decision was reversed by Governor Gray Davis, citing the severity

of the offense, Johnson's unstable social history and his failure to "assume full responsibility for his actions." Johnson challenges Governor Davis's decision.

The Governor's independent decision to affirm, modify, or reverse a parole decision of the Board must satisfy the requirements of procedural due process. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660.) The decision must be based on the same factors that restrict the Board in rendering its parole decision. (*Ibid.*) Courts review the Governor's decision to determine if it complies with due process of law and whether the factual basis of the decision is supported by some evidence in the record that was before the Board. (*Id.* at p. 667.)

Presiding Justice McConnell and Justice Haller vote to deny the petition based on the facts of the crime that demonstrate Johnson committed the offense in an especially heinous, atrocious, or cruel manner. (Cal Code Regs., tit. 15, § 2402, subd. (c)(1).) "'The nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole. [Citations.]" (*In re Rosenkrantz, supra,* 29 Cal.4th, 616, 682.) The facts of Johnson's crime as related in the probation report are Johnson and his crime partner planned to accost a young couple in a public park, rob and kill the young man and rape and kill the young woman. On their first attempt the couple escaped. They contacted a second couple a week later; Johnson shot the young man in the chest with a shotgun and took his wallet and keys as he lay dying. The young girl ran away; the crime partner shot at her but she escaped.

Justice McDonald would issue the order to show cause and appoint counsel for Johnson.

The petition is denied.

/s/ McConnell
McCONNELL, P. J.

Copies to: All parties

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

FILED

Clerk of the Superior Court

JAN 17 2003

BY: C. KOGER

IN THE MATTER AND APPLICATION OF:	)HCN 678)CRN 4870
ROBERT JOHNSON,	)ORDER DENYING)PETITION FOR WRIT
Petitioner.	OF)HABEAS CORPUS

AFTER REVIEWING THE PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING EVIDENCE IN THE ABOVE REFERENCED MATTER, THE COURT FINDS AS FOLLOWS:

Petitioner pled guilty to first-degree murder in 1977 and was sentenced to seven years to life in prison, plus a two-year gun enhancement. Petitioner was repeatedly denied parole. In 1991, the Board of Prison Terms ("Board") found Petitioner suitable for parole, but that decision was reversed by then Governor Wilson. In 2001, the Board again found

Petitioner suitable for parole. However, Governor Davis reversed that decision.

In a petition for writ of habeas corpus filed in this court on December 19, 2002,[1] Petitioner contends the Governor has no jurisdiction to reverse the decision of the Board granting him parole. Petitioner further contends that the Governor's decision deprived him of his due process and equal protection rights, subjects him to double jeopardy and constitutes a bill of attainder. For the reasons which follow, the petition is denied.

1) Jurisdiction. Petitioner first challenges the Governor's jurisdiction to reverse the decision of the Board granting him parole. California Constitution Article V, Section 8(b) give the Governor the power to review parole decisions of the Board. As Petitioner is aware by virtue of his challenge to Governor Wilson's reversal of the Board's decision to grant him parole in 1991, this provision does not violate the ex post facto clauses of the federal and state constitutions as applied to prisoners, like Petitioner, who committed murder before the adoption of this provision. (*Johnson v. Gomez* (9th Cir. 1996) 92 F.3d 964.)

2) Due Process/Equal Protection. Petitioner next purports to challenge the Governor's decision on due process and equal protection grounds. In support of

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[1] Petitioner originally submitted his petition to the San Joaquin Superior Court. That Court transferred the petition to the San Diego County Superior Court, Central Division, in accordance with *In re Sena* (2001) 94 Cal.App.4th 836. As the North County Branch of the San Diego Superior Court constitutes a separate venue, the petition was transferred to that County for decision. San Diego Superior Court Local Rule, Div. I, Rule 1.7.

this claim, Petitioner argues that the Governor's reversal of the Board's decision is unsupported by the record and totally erroneous. The California Supreme Court recently determined the proper standard to be applied by the courts in reviewing such decisions. (*In re Rosenkrantz* (2002) 29 Cal.4th 616.) The Court stated,

> Article V, section 8(b), requires that a parole decision by the Governor pursuant to that provision be based upon the same factors the Board is required to consider. Due process of law requires that this decision be supported by some evidence in the record. Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to

> ascertaining whether there is some evidence in the record that supports the Governor's decision. *In re Rosenkrantz* (2002) 29 Cal.4th 616, 676 - 677.

The Governor's decision reversing the Board's determination that Petitioner was suitable for parole is attached to the petition as Exhibit C. In his statement of reasons, the Governor relied on the nature of the offense, Petitioner's unstable social history and his failure to take full responsibility for *his* role in the commitment offense. Petitioner does not challenge the Governor's statements regarding the severity of his crime or his failure to take full responsibility for the murder. Instead, Petitioner contends:

> (1) the record indicates that he is not unsuitable for parole release, (2) he did not have an unstable social history, (3) the Board's Matrix has not been correctly followed to set uniform terms, (4) that the intent of the Legislature to award "good-conduct" credits has not been correctly followed, (5) the Governor's relitigation of Petitioner's commitment offense to re-weigh the Board's Decision is not correct under his Constitutional powers and therefore, (6) that the Governor's reversal of the Board's Decision is unsupported by the record and is totally erroneous. Petition, pg. 3(d), Item 4.

Items 3 and 4 are irrelevant to the issues raised by the instant petition and will not be addressed further. The remaining contentions are without merit.

First, Petitioner's claim that he did not have an unstable social history is inconsistent with the

record. Petition Exhibit E, pg. 2. Furthermore, as the Supreme Court reiterated in *Rosenkrantz,*

> The nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole. (citations.) Although the parole authority is prohibited from adopting a blanket rule that automatically excludes parole for individuals who have been convicted of a particular type of offense, the authority properly may weigh heavily the degree of violence used and the amount of viciousness shown by a defendant. (*In re Seabock, supra,* 140 Cal.App.3d at pp. 36-37.) *In re Rosenkrantz* (2002) 29 Cal.4th 616, 682 - 683.

As in *Rosenkrantz,* the Governor's decision in this case was based primarily on the callous nature of the murder. It is undisputed that Petitioner and a friend sought out vulnerable young couples parked in remote areas with the intent of killing and robbing the young man; the kidnapping, raping and killing the young woman. Their first attempt was thwarted when the couple escaped. The second couple was not so fortunate.

In the early morning hours of July 3, 1977, Petitioner and his partner, Mr. Davis, pulled up beside the parked vehicle of the victims and got out. Petitioner ordered the young man, Michael Windsor, out of the car at gunpoint. Mr. Davis ordered the young woman, Brenda Hawkins, to get into the back seat of their car. However, she broke free and ran. Mr. Davis then ordered Petitioner to shoot Mr. Windsor. Petitioner shot Mr. Windsor in the chest. While Mr. Davis was pursing Ms. Hawkins with the shotgun, Petitioner took Mr. Windsor's keys and wallet. Mr. Davis returned, stating Ms. Hawkins

had escaped. Petitioner and Mr. Davis then left Mr. Windsor to die.

Although the Governor also noted Petitioner's unstable social history and failure to take full responsibility for the murder, he concluded that "the severity of this callous offense alone merits a further period of incarceration." Ex. C pg. 3. Nothing in the Governor's decision indicates that he failed to afford petitioner individualized consideration of all relevant factors, or that the Governor's determination was based upon a blanket policy of denying parole to all individuals convicted of murder. Rather, it appears that the Governor concluded that the vicious nature of the crime outweighed the factors favoring release.

As the Governor's decision is supported by "some evidence," it cannot be set aside by this court. (*In re Rosenkrantz, supra,* 29 Cal.4th 676—677.)

3) Double Jeopardy

In support of his double jeopardy claim, Petitioner argued that the Governor was bound by the facts determined by the Board and was collaterally estopped from reaching a different result. First, the Governor and the Board are not the same party in this context. Moreover, the Governor is constitutionally authorized to render an independent decision regarding Petitioner's suitability for parole. Consequently, neither. double jeopardy nor collateral estoppel principles apply.

4) Bill of Attainder.

A bill of attainder is a legislative act that inflicts punishment either to named individuals or to easily ascertainable members of a group without a judicial trial. (*United States v. Lovett.* (1946) 328 U.S. 303.) Petitioner waived his right to a trial when he pled

guilty to the murder, he cannot assert a viable bill of attainder claim.

For the foregoing reasons, the petition is denied. A copy of this order shall be served on Petitioner and the Office of the District Attorney.

IT IS SO ORDERED.

DATED: Jan. 17th, 2003 /s/ Joan P. Weber
JOAN P. WEBER
JUDGE OF THE SUPERIOR COURT

SEAL of the GOVERNOR
Of the STATE OF CALIFORNIA

OFFICE OF THE GOVERNOR
December 13, 2001

VIA FACSIMILE AND U.S. MAIL

Mr. Robert Johnson, B-88644
Deuel Vocational Institution
C-344
Post Office Box 600
Tracy, California 95378-0400

Dear Mr. Johnson:

Penal Code section 3041.2 authorizes the Governor to review parole decisions of the Board of Prison Terms concerning persons sentenced to an indeterminate term upon conviction of murder.

After considering the same factors considered by the Board, the Governor has invoked his authority to reverse the Board's decision to grant parole in your case. The Governor's statement of the reasons for his decision is attached.

A copy of this letter is being provided to you via facsimile, and the signed original (along with a statement of the reasons for his decision) is being sent by mail. Additionally, we are transmitting a copy of this letter and the attached decision to the Chairperson of the Board of Prison Terms.

Sincerely,
/s/ Barry P. Goode
BARRY P. GOODE
Secretary of Legal Affairs

cc: Ms. Carol A. Daly, Chairperson
The Board of Prison Terms

INDETERMINATE SENTENCE PAROLE RELEASE REVIEW
(Penal Code Section 3041.2)

Robert Johnson, B-88644
First Degree Murder

NO ACTION

MODIFY

REVERSE X

On the evening of July 3, 1977, Robert Johnson and Reggie Davis were cruising in Mr. Davis' car. Mr. Davis suggested that they find a young couple, kill and rob the man and then kidnap, rape and kill the woman. In the early morning hours of July 4, Mr. Johnson and Mr. Davis drove into Kit Carson park in Escondido, California. Mr. Johnson was armed with a loaded .20 gauge shotgun.

Mr. Johnson noticed a car, occupied by 17-year-old victims Michael Windsor and Brenda Hawkins, parked on the side of the road. Mr. Davis stated that they should pull beside the vehicle and "you [Mr. Johnson] shoot him and then we will get the girl." He then stated that he would take the female victim to another location, tape her, shoot her and throw her off the cliff.

The crime partners pulled up beside the parked vehicle and got out. Mr. Johnson ordered Mr. Windsor out of his vehicle at gunpoint. Mr. Davis ordered Ms. Hawkins to get into the back seat of

their car. As Mr. Davis led her by the arm, she broke free and ran down a dirt road. Mr. Davis then ordered Mr. Johnson to shoot Mr. Windsor. Mr. Johnson complied, shooting Mr. Windsor in the chest. Mr. Davis then took the shotgun and pursued Ms. Hawkins, firing one round. Though Ms. Hawkins' sustained a minor pellet wound to her hand, she was able to elude her pursuer.

Mr. Johnson searched Mr. Windsor, who was still moving, taking his keys and wallet. Shortly thereafter, Mr. Davis returned, stating that Ms. Hawkins had escaped. The two drove off, but fearing Ms. Hawkins would be able to identify them, returned to the park to make another search. Unsuccessful, Mr. Davis dropped Mr. Johnson off at a street corner. Mr. Johnson disposed of Mr. Windsor's wallet and keys on the way home.

Mr. Windsor died at the scene. Mr. Johnson pled guilty to first degree murder and was sentenced to seven years to life.

Mr. Johnson and Mr. Davis attempted a similar crime at Kit Carson park approximately one week prior to the life crime. On the morning of June 28, 1977, while Mr. Davis waited nearby with a shotgun, Mr. Johnson approached a vehicle occupied by Richard Nordhaussen and Gayle Clanton. Posing as a police officer, Mr. Johnson demanded that Mr. Nordhaussen exit the vehicle. Mr. Nordhaussen asked Mr. Johnson for identification, as he was not in uniform. When Mr. Johnson was unable to produce any identification, Mr. Nordhaussen drove away.

The San Diego County District Attorney's Office is

opposed to parole for Mr. Johnson, stating that the life offense was "especially heinous" and that Mr. Johnson "would an unreasonable risk to society" if released. The Office stated that "the inmate and his partner planned to . . . kidnap, rape, and rob and kill the victims" and that "it was nearly a double homicide but for the fact that Ms. Hawkins was able to run away and escape."

The family of the deceased victim is also opposed to parole for Mr. Johnson. In a 1998 letter, the victim's mother stated that the Windsor family has lived with the suffering and pain "every waking moment for over twenty years," but that "our concern is no longer for us, for our lives were destroyed twenty years ago. What we beg for are the people, innocent people, who stand to be placed in jeopardy should this person be allowed back in society. It was so easy for this heinous crime to be committed, primarily because the perpetrators lacked any sense of morality and decency towards others."

Mr. Johnson has an unstable social history. According to Mr. Johnson, he had a turbulent home life and behavioral problems that required psychological treatment. He began experimenting with marijuana at age 12 and seriously abusing alcohol at age 16. Mr. Johnson's substance abuse led to two arrests for being a minor in possession of alcohol. Mr. Johnson stated that he had also been stopped by police several times for driving while under the influence, but he was never arrested or charged. He stated that he had been drinking heavily during the 48 hours immediately prior to the murder.

After careful planning, Mr. Johnson committed an execution-style murder of a random 17 year-old boy. He committed this heinous crime in order to help his crime partner complete the kidnap, rape and murder of the victim's young female companion. His actions demonstrate a complete disregard for human life and suffering.

Mr. Johnson has yet to take full responsibility for his role in this vicious crime. At the August 2001 parole suitability hearing panel, Mr. Johnson attempted to minimize his culpability by stating that he thought it was "like a game" and that "I didn't believe any of it would happen." Mr. Johnson has made similar comments in the past. However, the facts indicate that Mr. Johnson affirmatively carried out the crime exactly as it had been planned. He was holding the shotgun and could have stopped the crime at any time. Once the victim had been shot, Mr. Johnson callously rifled through the victim's pockets while he was still moving. Mr. Johnson attempted to commit an identical crime just a week earlier. I believe Mr. Johnson lacks insight into his own criminality and requires additional counseling to better understand the magnitude of his offense and the causative factors leading to it.

Mr. Johnson committed a grave crime for the purpose of helping his partner kidnap, rape and kill a young girl. The severity of this callous offense alone merits a further period of incarceration. However, Mr. Johnson also has an unstable social history and has yet to fully assume full responsibility for his actions.

I strongly believe that Mr. Johnson would represent an unreasonable threat to public safety if released at this time.

Accordingly, I REVERSE the Board of Prison Terms' decision to parole Mr. Johnson.

Decision Date: 12/12/01

/s/ Gray Davis
GRAY DAVIS
Governor

Supreme Court, U.S.
FILED

178

(2)

10-868

DEC 31 2010

No. 10-

OFFICE OF THE CLERK

In the Supreme Court of the United States

MATTHEW CATE, *Petitioner, et al.*

v.

JOHN PIRTLE, *Respondent, et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II OF II

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INDEX TO APPENDIX

VOLUME I OF II

Page

PIRTLE CASE

Ninth Circuit Opinion
Granting Habeas Corpus Relief
Pirtle v. *California Board of Prison Terms*
Case No. 07-16097. . . . . 1a-20a

California Supreme Court Order
Denying Habeas Corpus Relief
In re John Herman Pirtle
Case No. S119114 . . . . . .21a

California Court of Appeal Order
Denying Habeas Corpus Relief
In re John Herman Pirtle
Case No. C044757 . . . . . 22a

California Superior Court Order
Denying Habeas Corpus Relief
In the Matter of John H. Pirtle
Case No. 71619 . . . . . .23a-25a

Ninth Circuit Mandate
Pirtle v. *California Board of Prison Terms*
Case No. 07-16097 . . . . . .26a

Ninth Circuit Order Denying
Petition for Rehearing En Banc
Pirtle v. *California Board of Prison Terms*
Case No. 07-16097. . . . . .27a

Board of Prison Terms Hearing Transcript
Decision Pages. 28a-34a

District Court Findings and Recommendations
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 35a-80a

District Court Order Adopting Findings and
Recommendations
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 81a-82a

District Court Judgment
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 83a

District Court Order Granting Immediate Release
Pirtle v. *California Board of Prison Terms*
Case No. CIV S-04-0518 FCD KJM P 84a-85a

California Supreme Court Letter
In re John Herman Pirtle
Case No. 07-16097. . . . . 86a

JOHNSON CASE

Ninth Circuit Mandate
Johnson v. *Finn*
Case No. 06-17042. . . . . 87a

Ninth Circuit Order
Temporarily Granting Motion to Stay the Mandate
Johnson v. *Finn*
Case No. 06-17042. . . . . .88a-89a

Ninth Circuit Order
Denying the Petition for Panel Rehearing
Johnson v. *Finn*
Case No. 06-17042. . . . . .90a-91a

Ninth Circuit Memorandum Decision
Johnson v. *Finn*
Case No. 06-17042. . . . . .92a-96a

District Court Order
for Release of Person in Custody
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 97a-98a

District Court Order
and Writ of Habeas Corpus Ad Testificandum
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 99a-100a

District Court Order
Releasing Petitioner Subject to Conditions of Release
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 101a-105a

District Court Order Directing Parties to Appear
to Set Conditions of Release
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 106a

District Court Judgment
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 107a

District Court Order
Adopting Findings and Recommendations
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 108a-109a

District Court Order
and Findings and Recommendations
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 110a-115a

District Court Order
Referring Matter to Magistrate Judge
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 116a-119a

District Court Order
and Findings and Recommendations
Johnson v. *Finn*
Case No. 2:05-cv-0385 JAM GGH. 120a-144a

California Supreme Court Order
Denying Petition
In re Johnson
Case No. S119859 . . . . . 145a

California Court of Appeal Order
Denying Habeas Corpus Relief
In re Johnson
Case No. D041899. . . . . .146a-148a

California Superior Court Order
Denying Habeas Corpus Relief
In re Johnson
Case No. CRN 487001. . . . . .149a-155a

Governor's Parole Denial. 156a-161a

VOLUME II OF II

SNEED CASE

Ninth Circuit Mandate
Sneed v. *A.P. Kane*
Case No. 07-15061. . . . . 162a

Ninth Circuit Order
Denying Petition for Rehearing/En Banc
Sneed v. *A.P. Kane*
Case No. 07-15061. . . . . 163a

Ninth Circuit Memorandum
Sneed v. *A.P. Kane*
Case No. 07-15061. . . . . .164a-165a

District Court Judgment
Sneed v. *A.P. Kane*
Case No. C 05-4109 SI (pr). 166a

District Court Order Denying Petition
Sneed v. *A.P. Kane*
Case No. C 05-4109 SI (pr) 167a-182a

California Supreme Court Order
Denying Petition
In re Anthony Sneed
Case No. S123452. . . . . .183a

Governor's Parole Denial 184a-190a

MOSLEY CASE

Ninth Circuit Order
Staying Mandate
Mosley v. *Oroski*
Case No. 08-15327, 08-15328. . . . . 191a-192a

Ninth Circuit Order
Remanding to District Court Mosley's Motion
for Immediate Release
Mosley v. *Oroski*
Case No. 08-15327, 08-15328. . . . . 193a-194a

Ninth Circuit
Memorandum Decision
Mosley v. *Oroski*
Case No. 08-15327, 08-15328. . . . . 195a-199a

District Court Judgment
Mosley v. *Oroski*
Case No. C05-4260 TEH. 200a-201a

District Court Order
Mosley v. *Oroski*
Case No. C05-4260 TEH. 202a-217a

California Supreme Court Order
Denying Petition for Review
In re Ron Mosley
Case No. S135255. . . . . .218a

California Court of Appeal Order
Denying Habeas Corpus Relief
In re Ron Mosley
Case No. A110503 . . . . . .219a

California Superior Court Order
Denying Petition
In re Ron Mosley
Case No. SC141041A 220a-221a

Governor's Parole Denial. 222a-227a

District Court Order
Granting Bail
Mosley v. *Oroski*
Case No. C05-4260 TEH. 228a-238a

SLATER CASE

Ninth Circuit Mandate
Slater v. *Sullivan, et al.*
Case No. 09-17784 . . . . . .239a

Ninth Circuit Memorandum Decision
Slater v. *Sullivan, et al.*
Case No. 09-17784. . . . . .240a-244a

Ninth Circuit Order Denying Stay
Slater v. *Sullivan, et al.*
Case No. 09-17784 . . . . . .245a

District Court Order Denying Stay
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 246a-255a

District Court Judgment
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 256a

District Court Order Adopting Findings and Recommendations
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 257a-269a

District Court Findings and Recommendations
Slater v. *Sullivan, et al.*
Case No. 1:08-cv-00571 OWW JMD 270a-297a

California Supreme Court Order Denying Petition for Review
In re Slater
Case No. S156366. . . . . .298a

California Court of Appeal Order Denying Habeas Corpus Relief
In re Slater
Case No. B201547 . . . . . .299a

California Superior Court Order
Denying Habeas Corpus Relief
In re Slater
Case No. BH004061. . . . . 300a-302a

Board of Prison Terms Hearing Transcript
Decision Pages. 303a-309a

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 12 2010

Molly C Dwyer, Clerk
U.S. Court of Appeals

ANTHONY SNEED, Petitioner - Appellant, v. A.P. KANE, Respondent- Appellee.	No. 07-15061 D.C.No.CV-05-04109-SI U.S. District Court for Northern California, San Francisco **MANDATE**

The judgment of this Court, entered on August 02, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Gabriela Van Allen
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 12 2010

Molly C Dwyer, Clerk
U S Court of Appeals

ANTHONY SNEED, Petitioner - Appellant, v. A.P. KANE, Respondent - Appellee.	No. 07-15061 D.C. No.CV-05-04109 SI ORDER

Before: B. FLETCHER, REINHARDT, and WARDLAW, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Appellee's petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed case.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
August 2, 2010
Molly C. Dwyer, Clerk U.S. Court of Appeals

ANTHONY SNEED, Petitioner - Appellant, v. A.P. KANE, Respondent - Appellee.	No. 07-15061 D.C.No.CV-05-04109-SI MEMORANDUM*

Appeal from the United States District Court
For the Northern District of California
Susan Illston, District Judge, Presiding

Submitted July 19, 2008**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. 34(a)(2).

Before: B. FLETCHER, REINHARDT, and WARDLAW, Circuit Judges.

California state prisoner Anthony Sneed appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253[1], and we reverse and remand.

Sneed contends his commitment offense does not support the Governor's decision in light of the passage of time and evidence of his rehabilitation. An independent review of the record reveals that the state court unreasonably concluded that some evidence supports the Governor's decision. *See* 28 U.S.C. § 2254(D); *Cooke v. Solis*, 606 F.3d 1206, 1216 (9th Cir. 2010); *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *see also Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010) (en banc) ("The prisoner's aggravated offense does not establish current dangerousness 'unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state' supports the inference of dangerousness.") (quoting *In re Lawrence*, 190 P. 3d 535, 555, (Cal. 2008)). Therefore, we reverse the district court and remand with instructions to grant the writ.

REVERSED and REMANDED.

---

[1] We certify for appeal, on our own motion, the issue of whether the Governor's 2004 decision to reverse the Board of Prison Terms' decision to grant parole violated due process. The state has fully briefed the issue that we certify for appeal.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY SNEED,
Petitioner,

No. C 05-4109 SI (pr)

JUDGMENT

vs.

A.P. KANE,
Respondent. /

The petition for writ of habeas corpus is denied on the merits.

IT IS SO ORDERED AND ADJUDGED

Dated: December 18, 2006

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

FILED
DEC 18 2006

RICHARD W. WIEKING,
CLERK US DISTRICT
COURT
NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY SNEED, No. C 05-4109 SI (pr)

Petitioner,

vs. **ORDER DENYING HABEAS PETITION**

A.P. KANE,

Respondent. / **ENTERED IN CIVIL DOCKET 12/18/06**

INTRODUCTION

Anthony Sneed, a prisoner at the Correctional Training Facility in Soledad, California, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. This matter is now before the court for consideration of the merits of the pro se habeas petition. For the reasons discussed below, the petition will be denied.

BACKGROUND

Anthony Sneed was convicted in Los Angeles County Superior Court of first degree murder with use of a deadly weapon, and was sentenced to 26

years to life in prison in 1982. His habeas petition does not concern that conviction directly, but instead focuses on a December 30, 2004 decision by Governor Arnold Schwarzenegger to reverse a determination by a panel of the Board of Prison Terms ("BPT") to find Sneed suitable for parole.

The Governor identified the "gravity of the murder" as the reason for his determination that Sneed was not suitable for parole. Resp. Exh. 3 (December 18, 2004 Governor's decision), p. 3. The Governor stated that "the depraved and senseless nature" of the murder and Sneed's "exceptional callousness" is a "sufficient basis on which to conclude that his release from prison at this time would pose an unreasonable public-safety risk." Id. The specifics regarding the crime and the circumstances supporting the finding of unsuitability are described in the Discussion section later in this order.

Sneed filed habeas petitions in the California courts. Although there is a reasoned decision from the Los Angeles County Superior Court, that decision pertained to an earlier denial of parole by a BPT panel. See Petition, Exh D. The only state habeas decision that was issued after the Governor's decision and that considered the Governor's decision was the summary denial by the California Supreme Court. See id.

Sneed then filed his federal petition for a writ of habeas corpus. The court found cognizable one claim alleged in the petition: that the Governor's reversal of the BPT's decision violated Sneed's due process rights because it lacked sufficient evidentiary support. The court ordered respondent to show cause why the writ should not issue. Respondent filed an unsuccessful motion to dismiss. Respondent then

filed an answer and petitioner filed a traverse. This court considered the record rather sparse with regard to the commitment offense and ordered respondent to file a copy of that portion of the record pertaining to the commitment offense that the Governor had before him when he made his decision." Order For Supplemental Materials, p. 2. Respondent filed the requested materials. The matter is now ready for a decision on the merits.

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged action occurred at the Soledad Correctional Training Facility in Monterey County, California, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that state court remedies were exhausted for the claim asserted in the petition.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the

ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see Williams (Terry) v. Taylor, 529 U.S. 362, 409-13 (2000). Section 2254(d) applies to a habeas petition from a state prisoner challenging the denial of parole. See Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006).

The California Supreme Court upheld the Governor's decision in a summary denial of Sneed's habeas petition. Where, as here, the state court gives no reasoned explanation of its decision, an "independent review of the record" is the only means of deciding whether the state court's decision was objectively reasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). While the federal court sitting in habeas review need not "defer to a state court's decision when that court gives us nothing to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001).

DISCUSSION

A. Due Process Requires That Some Evidence Support a Parole Denial

A California prisoner with a sentence of a term of years to life with the possibility of parole has a protected liberty interest in release on parole and therefore a right to due process in the parole suitability proceedings. See Sass, 461 F.3d at 1127-28; Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979); Cal. Penal Code § 3041(b).

A parole board's decision satisfies the requirements of due process if "some evidence" supports the decision. Sass, 461 F.3d at 1128-29 (adopting some evidence standard for disciplinary hearings outlined in Superintendent v. Hill, 472 U.S. 445, 454-55 (1985)). The California Supreme Court has determined, as a matter of state law, that the Governor's decision must also satisfy the "some evidence" standard. See In re Rosenkrantz, 29 Cal.4th 616, 676-677 (Cal. 2002), cert. denied, 538 U.S. 980 (2003). The Governor's decision must be supported by some evidence.

"To determine whether the some evidence standard is met 'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached'" by the Governor. Sass, 461 F.3d at 1128 (quoting Superintendent v. Hill, 472 U.S. at 455-56). The "some evidence standard is minimal, and assures that 'the record is not so devoid of evidence that the findings of the . . . board were without support or otherwise arbitrary.'" Id. at 1129

(quoting Superintendent v. Hill, 472 U.S. at 457). The some evidence standard of Superintendent v. Hill is clearly established law in the parole context for purposes of § 2254(d). Sass, 461 F.3d at 1129.

Furthermore, and of key importance, the Governor and parole board are not precluded from relying on unchanging factors such as the circumstances of the commitment offense or the petitioner's pre-offense behavior in determining parole suitability. See id. at 1129 (commitment offenses in combination with prior offenses provided some evidence to support denial of parole). The familiar argument that the parole authority cannot rely on these factors is based on the Ninth Circuit's statements in Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003), that suggested that the value of the criminal offense fades over time as a predictor of parole suitability: "The Parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered. . . . A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." Biggs, 334 F.3d at 916-17. In Biggs, the Ninth Circuit upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, but cautioned that "[o]ver time . . . , should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole." Id. at 916. These statements were dicta and not clearly established federal law as set forth by the Supreme

Court, such that the state court's refusal to adopt the Biggs reasoning would be a decision contrary to, or an unreasonable application of, clearly established federal law as set forth by the Supreme Court. The Ninth Circuit recently backed away from the Biggs statements, and confirmed that these statements from Biggs were dicta and were inappropriate under § 2254. See Sass, 461 F.3d at 1129. "Under AEDPA it is not our function to speculate about how future parole hearings could proceed." Sass, 461 F.3d at 1129.

What little guidance has come from the Supreme Court suggests that judicial review should be extremely deferential to the original decision-maker in the parole context. In addition to the very low evidentiary standard that Superintendent v. Hill imposes, other Supreme Court comments suggest that the judiciary should be quite mindful of the subjective and predictive nature of a parole board's decision. See Greenholtz, 442 U.S. at 13. "No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of decisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation." Id.; see also id. at 8. In California, that deference applies with equal strength to the Governor's decision to reverse the parole board's finding of suitability. See Rosenkrantz, 29 Cal.4th at 677 ("As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor").

Past criminal conduct is not some arbitrary factor like eye color that has nothing to do with present dangerousness. Recidivism concerns are genuine. See Ewing v. California, 538 U.S. 11, 26 (2003) (O'Connor J.) (noting a report stating that over 60% of violent offenders were arrested again within three years of their release). California's parole scheme does not offend due process by allowing the BPT to predict that an inmate presents a present danger based on a murder he committed many years ago.

Having determined that there is a due process right, and that some evidence is the evidentiary standard for judicial review, the next step is to look to state law because that sets the criteria to which the some evidence standard applies. One must look to state law to answer the question, "'some evidence' of what?"

B. State Law Standards For Parole For Murderers In California

California uses indeterminate sentences for most non-capital murderers, with the term being life imprisonment and parole eligibility after a certain minimum number of years. A first degree murder conviction yields a minimum term of 25 years to life and a second degree murder conviction yields a base term of 15 years to life imprisonment. See In re Dannenberg, 34 Cal. 4th 1061, 1078 (Cal.), cert. denied, 126 S. Ct. 92 (2005); Cal. Penal Code § 190. The upshot of California's parole scheme described below is that a release date normally must be set unless various factors exist, but the "unless" qualifier is substantial.

A BPT panel meets with an inmate one year before the prisoner's minimum eligible release date

"and shall normally set a parole release date....The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates." Cal. Penal Code § 3041(a). Significantly, that statute also provides that the panel "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code § 3041(b).

One of the implementing regulations, 15 Cal. Code Regs. § 2401, provides: "A parole date shall be denied if the prisoner is found unsuitable for parole under Section 2402(c). A parole date shall be set if the prisoner is found suitable for parole under Section 2402(d). A parole date set under this article shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude with respect to the threat to the public."[1] The regulation

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[1] The listed circumstances tending to show unsuitability for parole are the nature of the commitment offense, i.e., whether the prisoner committed the offense in "an especially heinous, atrocious or cruel manner"; the prisoner has a previous record of violence; the prisoner has an unstable social history; the prisoner previously engaged in a sadistic sexual offense; the prisoner has a lengthy history of severe mental problems related to the offense; and negative institutional behavior. 15 Cal. Code Regs § 2402(c). The listed circumstances tending to show suitability for parole are the absence of a juvenile record,

(continued .)

also provides that "[t]he panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." 15 Cal. Code Regs. § 2402(a). The panel may consider all relevant and reliable information available to it. 15 Cal. Code Regs. § 2402(b).

The regulations contain a matrix of suggested base terms for several categories of crimes. See 15 Cal. Code Regs. § 2403. For example, for second degree murders, the matrix of base terms ranges from the low of 15, 16, or 17 years to a high of 19, 20, or 21 years, depending on some of the facts of the crime. Some prisoners estimate their time to serve based only on the matrix. However, going straight to the matrix to calculate the sentence puts the cart before the horse because it ignores critical language in the relevant statute and regulations that requires him first to be found suitable for parole.

The statutory scheme places individual suitability for parole above a prisoner's expectancy in early setting of a fixed date designed to ensure term uniformity. Dannenberg, 34 Cal. 4th at 1070-71. Under state law, the matrix is not reached unless and until the prisoner is found suitable for parole. Id. at 1070-71; 15 Cal. Code Regs. § 2403(a) ("[t]he

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(...continued)
stable social history, signs of remorse, a stressful motivation for the crime, whether the prisoner suffered from battered woman's syndrome, lack of criminal history, the present age reduces the probability of recidivism, the prisoner has made realistic plans for release or developed marketable skills, and positive institutional behavior 15 Cal. Code Regs. § 2402(d)

panel shall set a base term for each life prisoner who is found suitable for parole"). The California Supreme Court's determination of state law in Dannenberg is binding in this federal habeas action. See Hicks v. Feiock, 485 U.S. 624, 629-30 (1988).

The California Supreme Court also has determined that the facts of the crime can alone support a sentence longer than the statutory minimum even if everything else about the prisoner is laudable. "While the Board must point to factors beyond the minimum elements of the crime for which the inmate was committed, it need engage in no further comparative analysis before concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner's release." Dannenberg, 34 Cal. 4th at 1071; see also In re Rosenkrantz, 29 Cal. 4th 616, 682-83 (Cal. 2002), cert. denied, 538 U.S. 980 (2003) ("[t]he nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole" but might violate due process "where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense").

C. Some Evidence Supports The Governor's Decision In Sneed's Case

The crime was summarized in the Life Prisoner Evaluation Report available to the Governor:

> During the late evening hours of 1/17/81, a house party was held in Pomona, CA and in attendance were members of both the "Blood" and "Cuzz" Gangs. During [the] course of the party, a handgun was discharged but no one was injured. It

> appeared the gunshot was the aftermath of arguments between rival gang members. Some partygoers stated that they had seen a pistol in the hand of seventeen-year old Anthony Burton and he hurriedly left in the company of Derrick and Ronald Washington. All three juveniles were seen entering a vehicle driven by Sneed, which departed the area. Various partygoers had attempted to stop the three teenagers from leaving, but they were unsuccessful because of the assistance given them by Sneed. A short time later, near the intersection of Larchmont and Ashfield in Pomona, seventeen-year old Fred Wright was shot to death. Officers that responded to the crime scene were advised by witnesses that they had seen Anthony Burton, Derrick Washington, Ronald Washington, and a person that wore clothing similar to Sneed, running from where Fred Wright had fallen.

Supplemental Materials, attach. 6, p. 1. The person who fired the shots at the party and in the alley was determined to be Burton and not Sneed. Id. Although the summary of the crime reported only one shooting victim, other documents in the record showed that the shots in the alley hit two victims: Fred Wright was shot in the forehead and Elizabeth Wilson was shot in the thigh. See Supplemental Materials, attach. 1 (verdict forms); attach. 4 (sentencing hearing transcript). The shooting of Fred Wright was the basis for Sneed's first degree murder conviction. As to the shooting of Elizabeth Wilson, Sneed was found not guilty of attempted murder but guilty of assault with a deadly weapon. See

Supplemental Materials, attach. 1.

At the parole suitability hearing, Sneed suggested he had a very limited involvement in the murder. Sneed stated that the juveniles (Burton and the Washington brothers) ran into the alley and that Sneed stayed by the car when the killing took place. He stated that the juveniles returned, he asked what had happened and was told that Burton had fired the gun. RT 13-17. Sneed stated that he left the juveniles and went to a corner store, where he bought chips and a soda for a snack. RT 17. He stated that he did not learn until the next morning that Wright had been killed. RT 18. The Governor was not required to accept Sneed's version of what had happened. The Governor thought "that much of [Sneed's]story seems unlikely but did not consider it "a factor tipping the scales in favor of or against Mr. Sneed's parole at this time." Governor's decision, p. 2.

One of the circumstances tending to indicate unsuitability for parole is that the prisoner "committed the offense in an especially heinous, atrocious or cruel manner." 15 Cal. Code Regs. § 2402(c)(1). The factors to be considered in determining whether that circumstance exists are that there were multiple victims, "[t]he offense was carried out in a dispassionate and calculated manner, such as an execution-style murder," "[t]he victim was abused, defiled or mutilated during or after the offense," "[t]he offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering," and "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." 15 Cal. Code Regs. § 2402(c)(1).

The Governor identified the commitment offense as the reason for his decision to find Sneed

unsuitable for parole. There was some evidence in the record to support the Governor's determination that the circumstances of the commitment offense indicated unsuitability for parole. The Governor wrote:

> Mr. Sneed was involved in an inexplicable shooting spree that resulted in one person being killed and another being injured. There is nothing in the record before me to indicate why this group of young people was targeted. Likewise, based on the record before me, Mr. Wright was not the person that Mr. Burton had argued with earlier that night at the party. Mr. Wright and Ms. Wilson were doing nothing more than standing on a street corner with friends. They were not armed and did not present any sort of threat to Mr. Sneed or his partners. These two young people as well as their friends had no chance to defend themselves against this unexpected and lethal attack. The depraved and senseless nature of these shootings--as well as the exceptional callousness demonstrated by Mr. Sneed when, after knowing--at a minimum--that gun shots were fired in the vicinity of a group of people, he left the scene to get himself some snacks, makes the first-degree murder for which he was convicted especially grave. This factor alone is a sufficient basis on which to conclude that his release from prison at this time would pose an unreasonable public safety risk.

Governor's decision, p. 3. The Governor identified more than the minimum elements of a first degree murder. See Dannenberg, 34 Cal. 4th at 1071.

The Governor considered a circumstance and factors proper under California law in assessing Sneed's suitability for parole. The record supported a determination that murder was committed in a callous manner. There was evidence that Sneed was

in the alley with the shooter, that Sneed knew the shooter had a gun, and that Sneed went for a snack rather than call the police or check on the victims after the shooting occurred. The record also supported a determination that the motive for the killing was inexplicable given the severity of the crime. Wright and Wilson were not the people that Burton had been arguing with at the party; there was no evidence in the record as to why they were targeted. Id. at 20.

One of the things that caught the court's attention -- and prompted the order for supplemental materials -- was the attribution to Sneed of someone else's motive in firing a gun because Sneed had indicated at the parole hearing that he wasn't anywhere near the shooting and his total involvement had been as an unwitting driver. Under those circumstances, the triviality of the motive for the shooting might say little about Sneed's current dangerousness. The supplemental materials provided by respondent show, however, that there was evidence in the record that Sneed had a greater involvement than merely being an unknowing chauffeur on the night of the killing. At the sentencing hearing, the prosecutor described the murder as "an ambush" and stated that the earlier shooting at the party "was very possibly part of the reason for the shooting of this individual." Supplemental Materials, attach., p. 4. Even defense counsel conceded that Sneed was in the alley at the time of the shooting, although he was not the shooter. Id. at 5. When defense counsel urged the Sneed was found not to have been armed, the judge corrected him and stated that the jury found that Sneed "was armed with a firearm, but did not use a firearm." Id. Sneed may portray himself as just an

unwitting driver, but the record indicates he was much more in the thick of things when Wright was killed and Wilson was injured.

Upon an independent review of the record, the court concludes that there was some evidence to support the Governor's decision. The California Supreme Court's denial of Sneed's petition for writ of habeas corpus was not contrary to or an unreasonable application of clearly federal law as established by the U.S. Supreme Court. Sneed is not entitled to the writ.

CONCLUSION

For the foregoing reasons, the petition is denied on the merits. The clerk shall close the file.

IT IS SO ORDERED.

DATED: December 18, 2006

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

S123452

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ANTHONY SNEED on Habeas Corpus

Petition for writ of habeas corpus is DENIED.
George, C.J., was absent and did not participate.

Supreme Court
FILED

JUL 13 2005
Frederick K. Ohlrich
Clerk

DEPUTY

/s/ Werdegar
Acting Chief Justice

SEAL of the GOVERNOR
Of the STATE OF CALIFORNIA

OFFICE OF THE GOVERNOR

December 30, 2004

Via Facsimile and U.S. Mail

Mr. Anthony Sneed, C 43826
Correctional Training Facility, Central
ZW- 34IU
Post Office Box 686
Soledad, California 93960

Dear Mr. Sneed:

Penal Code section 3041.2 authorizes the Governor to review parole decisions of the Board of Prison Terms (Board) concerning persons sentenced to an indeterminate term upon conviction of murder.

After considering the same factors considered by the Board, the Governor has invoked his authority to reverse the Board's decision to grant parole in your case. The Governor's statement of the reasons for his decision is attached.

A copy of this letter is being provided to you via facsimile, and the signed original (along with a statement of the reasons for his decision) is being sent by mail. Additionally, we are transmitting a copy of this letter and the attached decision to the Chairperson of the Board of Prison Terms.

Sincerely,

/s/ Paul H. Dobson

PAUL H. DOBSON
Chief Deputy Legal Affairs Secretary

Attachment
cc: Ms. Margarita Perez, Chairperson
The Board of Prison Terms (w/attachment)

GOVERNOR ARNOLD SCHWARZENEGGER
SACRAMENTO, CALIFORNIA 95814 (916) 445-2841
INDETERMINATE SENTENCE PAROLE
RELEASE REVIEW
(Penal Code Section 3041.2)

ANTHONY SNEED, C-43826
FIRST DEGREE MURDER

NO ACTION

MODIFY

REVERSE X

During the early morning hours on January 18, 1981, 17-year-old Fred Wright was shot to death while standing on a street corner talking with friends. Also wounded was 16-year-old Elizabeth Wilson.

Earlier that evening, 19-year-old Anthony Sneed drove 15 year-old Derrick Washington, his brother 13-year-old Ronald Washington, and their 16-year old cousin Anthony Burton to a house party in the neighborhood. Present at the party were members of both the Blood and the Cuzz gangs. Mr. Burton argued with one of the other persons at the party. Ronald Washington handed Mr. Burton a gun and Mr. Burton fired several shots. No one was hurt. Although some of the attendees at the party tried to stop the Washington brothers and Br. Burton from leaving, Mr. Sneed hurriedly drove them away from the party and back to their home. As a result of the shooting, the party broke up and people started to

leave.

Fred Wright, Ms. Wilson, and several others were among those that left the party on foot. Mr. Sneed, Mr. Burton and the two Washington brothers were standing outside their home and near Mr. Sneed's car when they observed Mr. Wright's group on a nearby corner talking. Mr. Burton, followed by Mr. Sneed and the Washington brothers, ran into an alley and then Mr. Burton fired several shots toward the group standing on the corner. Mr. Wright was struck in the forehead, and Ms. Wilson was struck in the thigh. Witnesses later advised police officers that they saw Mr. Sneed, Mr. Burton and the Washington brothers running from the area after Mr. Wright was shot. Ms. Wilson survived, but Mr. Wright died.

A jury found Mr. Sneed guilty of first-degree murder, assault by means of force likely to produce great bodily harm, and shooting at an inhabited dwelling. The jury specifically found that Mr. Buron – not Mr. Sneed – used a firearm in the commission of the murder and the assault. Mr. Sneed was sentenced to 26 years to life in prison for the murder, three years concurrent for the assault, and two years concurrent for shooting at an inhabited dwelling.

At the time of the murder, Mr. Sneed was on probation due to a conviction at age 18 for receiving stolen property. He also was placed on probation twice as a juvenile, once for burglary and once for petty theft. Mr. Sneed had no documented history of violent or assaultive behavior, however, when Mr. Wright was murdered.

Since entering prison nearly 23 years ago, Mr. Sneed has been disciplined three times for serious-rules violations, the last of which occurred in 1996 for failing to report to work, and counseled four times for minor misconduct. He has, however, remained

discipline-free for the last eight years and has made efforts during his imprisonment to enhance his ability to function within the law upon release. In 2002, he obtained his GED. He has also completed vocational paint and decoration, dry cleaning, and appliance repair, and he worked for many years in Textiles as a lead man and as a trainer. He has participated in Breaking Barriers I and II and complied with the 2003 Board's recommendation that he participate in self –help reading. He has received laudatory reports for his self-help study and for his excellent work as a trainer and as a teacher's aide. He received an honorable mention for drawings that he entered in the 1996 prison arts contest. He has received favorable institutional and mental-health evaluations, which reflect his acceptance of responsibility and remorse about the murder and include low risk assessments. These factors are all supportive of Mr. Sneed's release from prison to parole.

Likewise, Mr. Sneed has maintained seemingly solid relationships with his family and has confirmed housing offers with family members upon parole. He also has offers from family to help him financially and to help him find employment. These are positive factors, as is the fact that Mr. Sneed has acquired marketable skills during his imprisonment that can be put to good use upon parole. Mr. Sneed, however, currently has no employment offer upon parole. I note that a representative from the Los Angeles County District Attorney's Office attended the 2004 hearing and expressed apprehension about Mr. Sneed's release from prison due to his ambiguous work plans upon parole.

For many years, Mr. Sneed denied that he was present at the street-corner shooting and claimed

that he did not learn about Mr. Wright's murder until the next day. At his hearing in 2004, however, Mr. Sneed admitted that he was "a couple of hundred feet" away from where Mr. Wright was shot, but he maintained that he did not find out that Mr. Wright had been killed until the next morning. According to the police report, neighbors heard at least six shots fired, and two people were shot. Mr. Sneed told the 2004 Board that, after the shots were fired, Ronald Washington told him that Anthony had fired some shots. He went on to tell the Board, "So I got in my car and left. So when I left, I went to 7-Eleven, bought me a soda and stuff like that and some chips or something." According to him, when he returned to the Washingtons' house to "see what was going on," he was told "nothing had happened." Despite Mr. Sneed agreeing to drive the Washingtons to a party attended by gang members, helping them flee the party after Mr. Wright and Ms. Wilson were gunned down, he told the 2004 Board that the Washington brothers were not his friends or associates, but that he just knew them because he had helped their older brother get a job. While not a factor tipping the scales in favor of or against Mr. Sneed's parole at this time, I would be remiss to ignore that much of his story seems unlikely.

Although Mr. Sneed was either not capable or not willing to accept responsibility for Mr. Wright's murder for many years afterwards, he has demonstrated increased insight and understanding into the magnitude of his conduct and culpability. Consistent with various comments he has made over the last few years, Mr. Sneed told the Board at his 2004 hearing, "If I would have just left the guys at the party and gave law enforcement time to get there to arrest them for firing it at the party, the murder

would never have occurred. And I was battling with that for a long time. I kept telling myself I didn't kill anybody. Why am I going through all this. But I wasn't really looking at the entire picture about the role that I played by helping the guys leave the area." This is progress albeit too recent to tip the scales in favor of Mr. Sneed's parole suitability at this time.

Mr. Sneed was involved in an inexplicable shooting spree that resulted in one person being killed and another being injured. There is nothing in the record before me to indicate why this group of young people was targeted. Likewise, based on the record before me, Mr. Wright was not the person that Mr. Buron had argued with earlier that night at the party. Mr. Wright and Ms. Wilson were doing nothing more than standing on a street corner with friends. They were not armed and did not present any sort of threat to Mr. Sneed or his partners. These two young people as well as their friends had no chance to defend themselves against this unexpected and lethal attack. The depraved and senseless nature of these shootings—as well as the exceptional callousness demonstrated by Mr. Sneed when, after knowing—at a minimum—that gun shots were fired in the vicinity of a group of people, he left the scene to get himself some snacks, makes the first-degree murder for which he was convicted especially grave. This factor alone is sufficient basis on which to conclude that his release from prison at this time would pose an unreasonable public-safety risk.

Mr. Sneed has demonstrated increased maturity and has made credible gains while in prison. But after carefully considering the same factors that the Board must consider, I find the gravity of the murder for which Mr. Sneed was convicted presently outweighs the positive factors tending to support his

release from prison after serving less-than 23 years of a 26-to-life sentence in prison—and necessitates a longer period of incarceration. Accordingly, because I believe that Mr. Sneed would pose an unreasonable risk of danger to society if released at this time, I REVERSE the Board of Prison Terms' 2004 decision to grant parole to Mr. Sneed.

Decision Date: 12/18/04
/s/ Arnold Schwarzenegger
ARNOLD SCHWARZENEGGER
Governor, State of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 22 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RON MOSLEY, Petitioner – Appellant, v. S. OROSKI, Respondent – Appellee.	No. 08-15327 D.C. No. CV-05-04260-TEH Northern District of California, San Francisco ORDER

RON MOSLEY, Petitioner – Appellant, v. S. OROSKI, Respondent – Appellee.	No. 08-15328 D.C. No. CV-05-04260-TEH Northern District of California, San Francisco

Before: ALARCÓN and RYMER, Circuit Judges, and TRAGER, Senior District Judge.[1]

[1] The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by (continued...)

Respondent's motion to stay issuance of mandate pending petition for a writ of certiorari is GRANTED. Pursuant to Fed. R. App. P. 41(d)(2), the mandate in the case is stayed for ninety (90) days to permit the appellant to file a petition for writ of certiorari in the Supreme Court. Should the Supreme Court grant certiorari, the mandate will be stayed pending its disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this court immediately upon the Supreme Court's decision.

(...continued)
designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 14 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RON MOSLEY, Petitioner – Appellant, v. S. OROSKI, Respondent – Appellee.	No. 08-15327 D.C. No. CV-05-04260-TEH Northern District of California, San Francisco ORDER

RON MOSLEY, Petitioner – Appellant, v. S. OROSKI, Respondent – Appellee.	No. 08-15328 D.C. No. CV-05-04260-TEH Northern District of California, San Francisco

Before: ALARCÓN and RYMER, Circuit Judges.

and TRAGER, Senior District Judge.

The case is remanded to the district court for the limited purpose of determining whether petitioner is entitled to bail or release pending final resolution of the case.

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* The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 24 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RON MOSLEY, Petitioner – Appellant, v. S. OROSKI, Respondent – Appellee.	No. 08-15327 D.C. No. CV-05-04260-TEH MEMORANDUM*

RON MOSLEY, Petitioner – Appellant, v. S. OROSKI, Respondent – Appellee.	No. 08-15328 D.C. No. CV-05-04260-TEH

Appeal from the United States District Court
for the Northern District of California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Thelton E. Henderson,
Senior District Judge, Presiding

Argued and Submitted November 1, 2010
San Francisco, California

Before: ALARCÓN and RYMER, Circuit Judges, and TRAGER, Senior District Judge.**

California state prisoner Ron Mosley appeals the denial of his petition for a writ of habeas corpus. In it, he challenges Governor Arnold Schwarzenegger's reversal of a grant of parole by the California Board of Prison Terms. We reverse.

Our treatment of this appeal largely follows from *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), and its progeny.[1] First, as *Hayward* now makes clear, Mosley must obtain a certificate of appealability before he may appeal. 603 F.3d at 554-55 (overturning our prior law to the contrary with respect to detention arising out of an administrative determination); 28 U.S.C. § 2253(c)(1). We grant the certificate sua sponte because Mosley "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Second, on the merits, *Hayward*, *Pirtle*, *Cooke*, and *Pearson* have also settled the existence of a California prisoner's liberty interest in parole and the right to parole in the absence of "some evidence"

** The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by designation.

[1] *Pirtle v. Cal. Bd. of Prison Terms*, 611 F.3d 1015 (9th Cir. 2010); *Cooke v. Solis*, 606 F.3d 1206 (9th Cir. 2010); *Pearson v. Muntz*, 606 F.3d 606 (9th Cir. 2010).

of future dangerousness under state law. *See Hayward*, 603 F.3d at 562.

Third, when (as here) a state court has determined that the Governor's decision was supported by "some evidence," we are to ask whether the judicial decision was "an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.'"[2] *Id.* at 563 (quoting 28 U.S.C. § 2254(d)(1) and (d)(2)); *Cooke*, 606 F.3d at 1216. We conclude that it was because "some evidence" of future dangerousness is lacking. *See In re Lawrence*, 190 P.3d 535 (Cal. 2008); *In re Shaputis*, 190 P.3d 573 (Cal. 2008).

The California law that *Hayward* directs us to consider focuses on whether the inmate's release endangers public safety, not on the Governor's reasons for denying parole or on the factors by which suitability or unsuitability for parole are to be measured. *See Lawrence*, 190 P.3d at 553; *Shaputis*, 190 P.3d at 581. The standard is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." *Lawrence*, 190 P.3d at 539. Offense conduct alone is not enough, unless it continues to impose an unreasonable risk of danger or the record discloses that something in the prisoner's history or present mental state supports the inference of current dangerousness.

The Governor relied on Mosley's offense, which he regarded as especially heinous and which, in the

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[2] The question remains whether the state determination is contrary to federal law. *Wilson v. Corcoran*, No. 10-91, ___ U.S. ___, 2010 WL 4394137, at *2 (U.S. Nov. 8, 2010) (per curiam), but *Hayward* prescribes how we are to decide this

Governor's view, was alone sufficient to conclude that Mosley's release would pose an unreasonable public-safety risk. However, an aggravated offense "cannot, standing alone, constitute the requisite evidence of current dangerousness." *Cooke*, 606 F.3d at 1216. Other than the gravity of the offense, the Governor cited Mosley's "history" of substance abuse and aggression, which was based on a single incident that occurred in 1984; and his disciplinary record in prison, which consisted of five infractions (one in 1987 for failure to report, three in 1991 for failure to report to work, failure to obey orders, and disrespect towards staff, and one in 1994 for disrespect towards staff), and nine counseling memoranda for missing a class or work, being out of bounds once, and refusing to take medication.[3] Neither shows current dangerousness. *See Pirtle*, 611 F.3d at 1023; *Lawrence*, 190 P.3d at 541.

Thus, "some evidence" of present dangerousness is lacking, so we must reverse. Although at argument the state asked that we remand to the Governor, we believe the appropriate relief in California is to vacate the Governor's decision and reinstate the Board's decision. *See Lawrence*, 190 P.3d at 538, 565; *In re McDonald*, No. B219424, ___ Cal. Rptr. 3d ___, 2010 WL 4296703, at *9-10 (Cal. Ct. App. Nov. 2, 2010).[4]

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[3] The record indicates that Mosley matured emotionally and had sincere remorse regarding the offense, and that he had realistic plans for release.

[4] We recognize that it has been some time since the Board's decision was rendered. We have no way of knowing whether its February 2005 decision still reflects the Board's judgment that Mosley is not currently a threat to public safety. The Board, however, retains its power to rescind that parole determination based on events occurring after its 2005 suitability

(continued .)

Accordingly, we reverse and remand with instructions to the district court to grant the writ, ordering the Governor's decision vacated and the Board's February 2005 decision reinstated.[5]

REVERSED AND REMANDED.

(...continued)
determination. *See In re Moses*, 106 Cal. Rptr. 3d 608, 636 n.15 (Cal. Ct App. 2010) (citing *In re Powell*, 755 P.2d 881 (Cal. 1988)). We express no opinion on the matter.

[5] Given this disposition, we have no need to resolve Mosley's two remaining challenges.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

FILED

MAY 1 2007

RICHARD W WIEKING
CLERK, U S DISTRICT COURT
NORTHERN DISTRICT
OF CALIFORNIA

Mosley,

Plaintiff,

v.

Oroski,

Defendant.

/

No. CV 05-04260 THE

JUDGMENT IN A CIVIL CASE

Entered – Civil Docket 5/2/07

() **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(XX) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that the petition for writ of habeas corpus is DENIED.

Date: 04/27/07 Richard W. Wieking, Clerk

By: R.B. Espinosa
Deputy Clerk

Case 3:05-cv-04260-THE Document 7 Filed 05/01/07
Page 1 of 12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RON MOSLEY, Petitioner, v. S. OROSKI, Respondent.	)))))))))	NO. C05-4260 TEH **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND INSTRUCTIONS TO THE CLERK**

I. INTRODUCTION

This is a petition for a writ of habeas corpus filed *pro se* by state prisoner Ron Mosley pursuant to 28 U.S.C. § 2254. Mosley challenges the state courts' denial of his petition for a writ of habeas corpus based on Governor Arnold Schwarzenegger's reversal of the Board of Prison Term's ("BPT's") decision to grant parole. Mosley alleges that the Governor's decision violated his plea agreement, was not supported by "some evidence," denied him the right to a jury trial, and constituted an Ex Post Facto application of the law. Having carefully considered the parties' papers and the record below, the Court hereby DENIES the petition for the reasons stated below.

II. BACKGROUND

On August 19, 1985, Petitioner Mosley was

involved in an argument with his employer, Edward Wallace. Wallace had hired Mosley to do yard work at Wallace's residence, and had agreed to pay Mosley approximately $60 for the work. Prior to completing the job, Mosley asked Wallace to pay him, but Wallace refused. Anticipating that Wallace would refuse to pay him, Mosley had armed himself with a knife before going to work that day. After Wallace refused to pay, Mosley stabbed Wallace to death with the knife. After the murder, Mosley covered Wallace's body with a sheet, went home to change clothes, returned to Wallace's house with a friend, and burglarized the residence. Mosley and his friend stole a television, a pistol, and Wallace's car. The next day, Mosley turned himself in to the Oakland Police Department. Mosley pleaded guilty to second degree murder in Alameda County Superior Court, and he was sentenced to a term of 15 years to life, with a minimum parole eligibility of ten years. Mosley is currently housed at San Quentin State Prison.

a. Parole Proceedings

On October 22, 2004, the BPT conducted a parole review hearing for Mosley. This was Mosley's fourth parole hearing before the BPT panel. On February 19, 2005, the BPT approved Mosley for parole, and in a letter dated March 11, 2005, Mosley was informed that the Governor had the authority to review and reverse the BPT decision. Answer at 17.

Thereafter, the Governor invoked his authority under California Penal Code § 3041.2 to review the decisions of the BPT. Answer, Ex. 4. Following a review of the decision, the Governor reversed the grant of parole for various reasons identified in the decision. Among the stated reasons was that Mosley

had been disciplined five times in his first nine years of incarceration, although the Governor noted that Mosley had not been disciplined in the last ten years. The Governor also cited that Mosley was "counseled" on nine separate occasions for failing to report to work assignments, including as recently as one year prior to his 2004 parole hearing, in addition to five occasions where he was counseled for other misconduct. The Governor's decision stated that "this factor is of great concern . . . since the murder . . . was employment related" and because it reflects on Mosley's "unwillingness or inability to curb his behavior to the rules of his environment[.]" *Id.* The Governor's decision also discussed Mosley's prior drug and alcohol abuse.

The Governor concluded that Mosley posed an unreasonable risk to public safety because of the nature of the underlying offense, including the fact that the murder was premeditated, that Mosley had an exceedingly trivial motive, and that Mosley demonstrated "extreme dispassion and callousness" by burglarizing the victim's home after the murder. *Id.* The Governor noted that the police reports reflect that Mosley's friend informed the police that "while they were burglarizing the home, it was necessary for them to step around Mr. Wallace's dead body on the garage floor to remove some of the property." *Id.*

b. State Court Habeas Proceedings

After the Governor's decision, Mosley sought habeas corpus relief in the state courts. On March 22, 2006, the Marin County Superior Court issued a decision denying Mosley's petition. The court rejected each of Mosley's arguments, finding that Mosley's "subjective expectation of the length of his indeterminate term . . . does not create an

entitlement." Answer, Ex. 2. The court also held that administrative review of parole does not violate the Ex Post Facto Clause. Furthermore, the court's decision referenced "Petitioner's own recitation of the Governor's stated reasons for the reversal," and held that the Governor's "decision was not arbitrary or capricious and that it [was] supported by some evidence." *Id.* This was the highest state court to issue a reasoned decision addressing the merits of Mosley's claim, and this Court therefore reviews the reasoning of the decision to determine whether it is in accord with clearly established federal law. *LaJoie v. Thompson*, 217 F.3d 911, 918 n.6 (9th Cir. 2002).

III. LEGAL STANDARD

Under California law, prisoners serving an indeterminate sentence for second degree murder "may serve up to life in prison, but . . . become eligible for parole consideration after serving minimum terms of confinement." *In re Dannenberg*, 34 Cal. 4th 1061, 1078 (2005). Although the BPT must "normally set a parole release date" before the minimum term has been served, an inmate "shall be found unsuitable for parole and denied parole if, in the judgment of the [BPT], the prisoner will pose an unreasonable risk of danger to society if released from prison." 15 C.C.R. § 2402(a). Any decision reached by the BPT is reviewable by the Governor within 30 days of the determination. Cal. Penal Code § 3041.2. In conducting that review, the Governor "may only affirm, modify or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider." Cal. Const. Art. 5, § 8.

Both the BPT's and the Governor's decisions must be supported by "some evidence" to satisfy the

requirements of due process. *McQuillion*, 306 F.3d 895, 904 (9th Cir. 2002). A determination of whether the "some evidence standard is met does not require examination of the entire record. . . . Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985). Additionally, the evidence underlying the decision must have some indicia of reliability. *McQuillion*, 306 F.3d at 904. A relevant factor in determining whether the evidence underlying the decision has some indicia of reliability is whether the prisoner was afforded an opportunity to appear before, and present evidence to, the BPT. *See Pedro v. Oregon Parole Bd.*, 825 F.2d 1396, 1399 (9th Cir. 1987).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") limits the authority of federal courts to issue a writ of habeas corpus. Under AEDPA, a district court may only grant a petition challenging a state conviction or sentence on the basis of a claim that was "adjudicated on the merits" in state court if the state court's adjudication of the claim:

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong of the Act applies both to questions of law and to mixed questions of law and fact. *Williams v. Taylor*, 529 U.S. 362, 407-07 (2001). The second prong applies to decisions based on factual determinations. *Miller-El v. Cockrell*, 537 U.S. 332, 339 (2003).

A state court has "adjudicated" a petitioner's claim on the merits for purposes of § 2254(d) when it has decided the petitioner's right to post-conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review on the merits. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). It is error for a federal court to review *de novo* a claim that was adjudicated on the merits in state court. *See Price v. Vincent*, 538 U.S. 634, 638-43 (2003).

"Clearly established federal law, as determined by the Supreme Court of the United States . . . refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. The "some evidence" standard identified in *Hill* is clearly established federal law in the parole context for AEDPA purposes. *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1128-29 (9th Cir. 2006). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. Additionally, a state court decision is contrary to federal law if it "applies a rule that contradicts the governing law." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Importantly, state court decisions are not required to cite Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state

court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 412-13. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously and incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. Whether the state court's decision was unreasonable must be assessed in light of the record that court had before it. *Holland v. Jackson*, 542 U.S. 649, 651 (2004) (per curiam). Moreover, the "unreasonable application" clause is objective, and the federal court should ask only if it the state court decision was reasonable, not whether other federal courts have applied federal law in the same manner as the state court. *Williams*, 529 U.S. at 409.

A federal court reviewing a state prisoner's habeas corpus petition may also grant the writ if it concludes that the adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An unreasonable determination of the facts occurs where the state court fails to consider and weigh highly probative relevant evidence, central to petitioner's claim, that was properly presented and made part of the state-court record. *Taylor v. Maddox*, 366 F.3d 992, 1005 (9th Cir. 2004). A district court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

IV. DISCUSSION

a. Due Process Violation

First, Respondent argues that Mosley does not have a liberty interest in parole, and therefore the Governor's reversal does not implicate due process concerns. However, this argument has been rejected by the Ninth Circuit, which has held that "California's parole scheme gives rise to a cognizable liberty interest in release on parole." *McQuillion*, 306 F.3d at 902. While a recent California Supreme Court decision may have cast some doubt on the continued existence of this right, *see Dannenberg*, 34 Cal. 4th 1061, the Ninth Circuit has since determined that "California inmates continue to have a liberty interest in parole after *In re Dannenberg*." *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1125 (9th Cir. 2006). "This liberty interest is created, not upon the grant of a parole date, but upon the incarceration of the inmate." *Id.* at 1127 (citation omitted). Therefore, the argument that Mosley does not have a liberty interest in parole is without merit.

Mosley argues that it was improper for the state courts to deny his petition for a writ of habeas corpus based on the Governor's decision to reverse the decision of the BPT. First, Mosley relies on California Code of Regulations, title 15, § 2402(b), which requires the BPT and Governor to consider "all relevant, reliable information . . . in determining suitability for parole." Mosley argues that the Governor's decision to reverse the BPT's grant of parole was supported by "unreliable" evidence and "patently unreasonable" conclusions, and therefore violated his right to due process. Traverse at 5. In making the parole suitability determination, the Governor viewed Mosley's "prison conduct record [as]

a negative factor weighing against his parole." Answer, Ex. 2. The Governor also cited Mosley's prior alcohol and drug habits as tending to support a finding that he currently poses a threat to public safety. Mosley argues that the record did not tend to demonstrate current violent tendencies, and therefore did not constitute a legitimate basis to deny parole under 15 C.C.R. § 2402(a). He further argues that the Governor must have reached an unreasonable conclusion because he believes that this evidence does not support a finding that he is currently an unreasonable risk to society or a threat to public safety.

However, the plain language of § 2402(b) negates Mosley's argument. The section defines as "relevant, reliable information . . . the circumstances of the prisoner's social history," as well as whether the "prisoner has engaged in serious misconduct in prison or jail." 15 C.C.R. § 2402(b), (c). Therefore, the BPT and Governor properly considered Mosley's past drug and alcohol use, as well as his disciplinary record in prison, when determining Mosley's suitability for parole. In reversing the decision of the BPT, the Governor recognized that Mosley had been disciplined for failing to report to work as recently as 2004 and noted that Mosley's failure "to report to his work assignments . . . demonstrates his repeated and continued disregard for and unwillingness or inability to curb his behavior to the rules of his environment [which] . . . is of great concern to me since the murder committed by Mr. Mosley was employment related." Answer, Ex. 3. The Governor's conclusions based on those factors is reasonable and provide some evidence in support of his decision to deny parole. Therefore, Mosley's argument that the Governor's decision is unreasonable is without merit.

Mosley also argues that "persistent reliance on the commitment offense to deny parole not only risks dependence upon an unreliable factor, [but] it may also amount to a violation of due process." Traverse at 5 (citing *Biggs v. Terhune*, 334 F.3d 910, 917 (9th Cir. 2003)). Mosley asserts that such continued reliance "converts an indeterminate life sentence into the infinitely harsher sentence of life in prison without chance of parole." *Id.* at 6. Again, however, the plain language of the statute permits the BPT and the Governor to consider the nature of the base commitment offense in determining parole suitability. *See* 15 C.C.R. § 2402(c). Under the regulations, factors tending to show unsuitability for parole include whether the commitment offense was perpetrated in an "especially heinous, atrocious or cruel manner," as evinced by a murder that was "dispassionate and calculated," demonstrating an "exceptionally callous disregard for human suffering," or for which there was a "very trivial" motive in relation to the offense *Id.* at (c)(1)(B), (D), (E). In making the determination that Mosley was unsuitable for parole, the Governor noted that the murder was "especially heinous" because it was premeditated, that Mosley demonstrated "extreme dispassion and callousness" after the murder, and that there was an "exceedingly trivial motive" for the crime. These factors, taken together, provide "some evidence" that Mosley was unsuitable for parole and that his release would pose an unreasonable public-safety risk.

Moreover, in *Biggs*, the Ninth Circuit was discussing whether repeated reliance on the commitment offense would violate due process, an issue not before that court, thereby rendering the

language regarding this matter dicta. Consequently, that portion of *Biggs* does not create binding precedent, and it is insufficient to establish that the Governor's denial of parole constitutes a violation of Mosley's constitutional rights. *Williams*, 529 U.S. at 412.

Mosley also relies on *Irons v. Warden of California State Prison–Solano*, 358 F. Supp. 2d 936 (E.D. Cal. 2005), in support of his argument that the Governor's reversal of the BPT's decision violated his constitutional rights. In *Irons*, the district court reversed the BPT's denial of parole where the stated reason for denial was the nature of the underlying offense. However, the Ninth Circuit recently reversed the district court's decision and reinstated the denial by the BPT in that case, even though the prisoner had the support of the Deputy District Attorney, his "conduct ha[d] been exemplary" for sixteen years, and he completed numerous self help, substance abuse, violence, and vocational programs. *Irons v. Carey*, 479 F.3d 658 (9th Cir. 2007).

In overturning the district court's issuance of a writ of habeas corpus, the Ninth Circuit held that the BPT's determination was proper because there was "'some evidence' to support the Board's determination that Irons was unsuitable for parole under California law" solely because "Iron's crime was . . . cruel or vicious." *Id.* at 664 (where the petitioner, after an argument over the alleged theft of property, shot and stabbed his roommate, left the body wrapped in a sleeping bag for 10 days, and then dumped it in the ocean). The court specifically limited its holding by noting that "due process was not violated when [the] prisoners were deemed unsuitable for parole prior to the expiration of their minimum terms." *Id.* at 665. Therefore, while the reasoning of *Irons* is instructive

in the instant case, it is distinguishable on its facts because Mosley has already served the minimum term of confinement for the underlying offense.

Nevertheless, while Mosley has reached the minimum term of confinement, both the Governor's decision and that of the state courts are supported by some evidence. The Governor based his decision to reverse the BPT on a finding that the commitment offense was "especially heinous," in addition to Mosley's prison disciplinary record, including receiving counseling as recently as 2004 and his prior drug and alcohol use. While Mosley has already served the minimum term of confinement for his sentence, he does not share the same exemplary prison record and support enjoyed by the petitioner in *Irons*. The Governor's determination is neither an unreasonable determination of the facts in light of the evidence presented, nor a decision that is contrary to or an unreasonable application of federal law. "California's parole scheme does not offend due process by allowing the [BPT] to predict that an inmate presents a present danger based on a murder that he committed many years ago." *Barton v. Ayers*, No. C 06-3646, 2007 WL 1068199 (N.D. Cal. Apr. 10, 2007). Indeed, parole may properly be denied based on a consideration of the facts of the commitment offense that exceed the necessary minimum elements, as these facts may tend to indicate that the prisoner is unsuitable for parole. *See Dannenberg*, 34 Cal. 4th at 1071; *In re Rosenkrantz*, 29 Cal. 4th 616, 682-83 (2002).

Here, the Governor concluded that the facts of the commitment offense demonstrate that the murder was committed in an exceptionally cruel or callous manner. This consideration, combined with Mosley's prison record, provides some evidence that

he is a threat to public safety and therefore justifies reversal of the BPT's decision under California law. Thus, the state courts applied clearly established federal law and arrived at a conclusion that was in accord with, and not contrary to, that law. Moreover, both the state court and the Governor made reasonable determinations of the facts and properly applied relevant law to those facts. Accordingly, the Court hereby DENIES Mosley's petition for a writ of habeas corpus based on his claim that his due process rights were violated.

b. Ex Post Facto Clause Violation

Mosley next claims that the Governor's reversal of the BPT's finding of parole suitability violated his constitutional rights under the Ex Post Facto Clause because the Governor did not have final parole authority at the time Mosley was sentenced in 1985. The law was changed in 1988 when voters approved Proposition 89, which added section 8(b) to Article V of the California Constitution and gave the Governor the right to review BPT decisions. However, the Ninth Circuit has determined that the new law creates "a procedural rather than a substantive change," and that "ex post facto principles do not bar application of the new law to those convicted and sentenced before [the law's] effective date." *Johnson v. Gomez*, 92 F.3d 964, 965 (9th Cir. 1996). Therefore, Mosley's argument has no merit, and this claim for relief is DENIED.

c. Plea Agreement Violation

Mosley also argues that "the Governor's retroactive usage of the power afforded him under Article V, § 8(b) of the California Constitution to reverse his grant of parole has resulted in an

extension of the actual amount of time he was to serve in prison under the plea agreement." Petition at 9. However, Mosley does not provide any supporting facts to show that terms of his plea agreement were violated, nor does he provide any legal precedent for this argument. This is insufficient to support Mosley's petition, as "conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *see also Boehme v. Maxwell*, 423 F.3d 1056, 1058 (9th Cir. 1970). Because Mosley fails to allege the legal or factual basis for habeas relief based on a violation of his plea agreement, this claim for relief is therefore DENIED.

d. Denial of Right to Jury Trial

Finally, Mosley argues that under *Blakely v. Washington*, 542 U.S. 296 (2004), the Governor violated his right to a jury trial and to due process under the Sixth and Fourteenth Amendments by considering factors not determined by a jury, which resulted in an extension of his sentence. However, Mosley has no Sixth Amendment right to a jury trial with regard to the facts underlying the Governor's decision to deny parole. *McQuillion*, 306 F.3d at 904. Rather, the factors underlying the determination must only have "some indicia of reliability," *id.*, which may include the petitioner's presence at and participation in the parole hearing, *see Pedro*, 825 F.2d at 1399. Whereas the Court in *Blakely* held that facts not determined by the jury could not be used by a judge to extend the sentence beyond the statutory maximum, 542 U.S. at 301, the statutory maximum here is life in prison, a sentence that was determined many years before the Governor's

decision. *Blakely* is therefore inapplicable to this case. Moreover, Mosley was afforded the opportunity to appear at and participate in the parole hearings, the evidence presented therein was sufficiently reliable for the BPT and Governor to reach a parole suitability determination, and such a determination did not result in a sentence that is beyond the statutory maximum sentence.

Nor does Mosley have a due process right to a jury determination under California's parole scheme. *See* Cal. Penal Code §§ 3041(b) *et. seq.* The BPT, Governor, and state courts are bound to apply California law to determine parole suitability. *Irons*, 479 F.3d at 662; *see also Bd. of Pardons v. Allen*, 428 U.S. 369 (1987); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). As discussed above, the Governor, BPT and state courts considered a number of statutorily defined factors, and they properly adhered to California law in considering Mosley's parole. Therefore, Mosley's claim for relief based on a violation of his right to a jury trial is without merit, and the Court DENIES his claim for habeas relief on this basis.

V. CONCLUSION

In sum, the state court's decision that the Governor's reversal of the BPT's finding of parole suitability was supported by some evidence was neither contrary to, nor an unreasonable application of, clearly established federal law as defined by the Supreme Court, nor was it an unreasonable determination of the facts. The state court issued a reasoned decision denying habeas corpus based on the Governor's parole suitability determination. Although Mosley has a liberty interest in parole, he

was not denied that interest without due process of law. Furthermore, the Governor's reversal did not violate the Ex Post Facto Clause of the Constitution, nor does Mosley allege sufficient facts to demonstrate a violation of his plea agreement. Finally, Mosley is not entitled to a jury determination of the facts that serve as the basis for parole eligibility determinations. For these reasons, the Court hereby DENIES Mosley's petition for a writ of habeas corpus on the merits. The Clerk shall enter judgment in accordance with this order and close the file.

IT IS SO ORDERED.

Dated: 04/27/07

/s/ Thelton E. Henderson
THELTON E.HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

Court of Appeal, First Appellate District,
Division Four - No. A110503
S135255

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RON MOSLEY on Habeas Corpus

Petition for review DENIED.

SUPREME COURT
FILED
SEP - 7 2005
Frederick K. Ohlrich Clerk
DEPUTY

/s/ GEORGE
Chief Justice

*******COPY******

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

FILED

JUN 23 2005
Court of Appeals – First App Dist
By Diana Herbert
DEPUTY

In re: RON MOSLEY, On Habeas Corpus	A 110503

BY THE COURT:

The request for appointment of counsel is denied. The petition for writ of habeas corpus is denied.

(Reardon, Acting P.J., and Rivera, J., joined in the decision.)

Date: June 23, 2005 /s/ REARDON, ACTING P.J.

FILED

JUN 1 - 2005

MARIN COUNTY SUPERIOR COURT
By /s/ R M A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

IN THE MATTER OF Ron Mosley, D-20675 Petitioner, FOR WRIT OF HABEAS CORPUS.	)	Case No. SC141041A ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The petition for writ of *habeas corpus* is denied. The Petition does not state facts demonstrating a prima facie basis for relief. Petitioner's subjective expectation of the length of his indeterminate term, if there was one, does not create an entitlement. His argument that changes in administrative review of parole violates the *ex post facto* principle is not supported by the facts or the authorities cited. Petitioner's own recitation of the Governor's stated

reasons for the reversal of the Parole Board demonstrates that the decision is not arbitrary or capricious and that it is supported by some evidence. The Court cannot order what the law does not provide, namely that the Governor may not disagree with the Parole Board on the basis of a different view of the same record. In fact, he has authority to do that and apparently he has done it.

Dated: June 1, 2005

/s/ John S. Graham
JOHN S. GRAHAM
Judge of the Superior Court

Cc: Petitioner
Warden
Attorney General

[MARIN COUNTY SEAL]

THIS INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE

Attest:

MAR 22 2006

Court Executive Officer
MARIN COUNTY SUPERIOR COURT
BY T. GARDNER, DEPUTY

SEAL of the GOVERNOR

Of the STATE OF CALIFORNIA

OFFICE OF THE GOVERNOR

March 21, 2005

VIA FACSIMILE AND U.S. MAIL
Mr. Ron Mosley, D-20675
California State Prison – San Quentin
3N - 38
Post Office Box D-20675
San Quentin, California 94974

Dear Mr. Mosley:

Penal Code section 3041.2 authorizes the Governor to review parole decisions of the Board of Prison Terms (Board) concerning persons sentenced to an indeterminate term upon conviction of murder.

After considering the same factors considered by the Board, the Governor has invoked his authority to reverse the Board's decision to grant parole in your case. The Governor's statement of the reasons for his decision is attached.

A copy of this letter is being provided to you via facsimile, and the signed original (along with a statement of the reasons for his decision) is being sent by mail. Additionally, we are transmitting a copy of this letter and the attached decision to the Chairperson of the Board of Prison Terms.

Sincerely,

/s/ Peter Siggins

PETER SIGGINS
Legal Affairs Secretary

Attachment
cc: Ms. Margarita Perez, Chairperson

INDETERMINATE SENTENCE PAROLE RELEASE REVIEW
(Penal Code Section 3041.2)

RON MOSLEY, D-20675
SECOND-DEGREE MURDER

NO ACTION

MODIFY

REVERSE ___X___

On the morning of August 19, 1985, Mr. Mosley worked for Mr. Wallace doing yard work around his home. On August 19, Mr. Mosley armed himself with a kitchen knife, went to Mr. Wallace's home, and indicated to Mr. Wallace that he wanted to be paid in full for the job even though the work had not been completed yet. When Mr. Wallace refused, Mr. Mosley became enraged. He pulled out the kitchen knife and stabbed Mr. Wallace multiple times, killing him.

Afterwards, Mr. Mosley went home and changed clothes. He then returned to Mr. Wallace's home with a friend and stole a television, a gun, and Mr. Wallace's car.

Mr. Mosley surrendered to police the following day and later pled guilty to second-degree murder. He was sentenced to 15 years to life in prison.

At the time of the murder, Mr. Mosley had no criminal record. He did, however, have a history of substance abuse inclusive of alcohol, marijuana, and

cocaine and a history of aggression. As described by prison mental-health evaluators in 1992 and 2001, Mr. Mosley came home intoxicated on one occasion as a teenager and, when his family called police, he was arrested. The next day, angry about the arrest, he damaged his brother's car by beating it with an axe handle and then again tried to force his way inside his family's home.

After entering prison for Mr. Wallace's murder, Mr. Mosley's behavior did not immediately improve. Although he has been discipline free for 10 years, three months now, he was disciplined a total of five times during the first nine years of his incarceration for rules violations, including once for failing to report to his class assignment and four times for disobeying orders or being disrespectful to staff. He also has been counseled on nine other occasions for failing to report to assignments, including as recently as 2004 when he did not show up for work, and on five additional occasions for other misconduct. Mr. Mosley's slightly-more-than 10 years of discipline-free conduct is at this time inadequate to tip the scales in favor of parole suitability, particularly given that despite previously being counseled eight times and disciplined once for failing to report, he failed to report to his work assignment again just last year. His prison conduct record is instead a negative factor weighing against his parole currently because it demonstrates his repeated and continued disregard for and unwillingness or inability to curb his behavior to the rules of his environment especially where showing up for assignments are concerned. This factor is of great concern to me since the murder committed by Mr. Mosley was employment related.

That being said, however, Mr. Mosley has made efforts to improve his ability to function within the law upon release and this weighs favorably toward his parole. He has earned a GED, has taken college classes, has received vocational training in welding and shoe repair, and has held a variety of skilled institutional jobs. He has participated in a wide array of self help and therapy, including Alcoholics Anonymous, Narcotics Anonymous, Vital Issues Project, Criminal Thinking Group, Non Directive Process Oriented Therapy Group, Rational Behavior Training Group, Anger Control Group, Alternatives to Violence, Victim Awareness, Overcomers Outreach, Project IMPACT, and Developing a Positive Attitude Group. And he has made realistic, confirmed plans upon parole to return to his last county of residence and live with his mother and work for a metal works business.

Moreover, Mr. Mosley says that he accepts full responsibility and is remorseful for murdering Mr. Wallace. Both correctional and mental health professionals have given him positive evaluations over the years and at least one mental health evaluator has indicated that he has addressed his history of substance abuse and his history of aggression.

But the second degree murder for which Mr. Mosley was convicted was especially heinous because he killed his victim over collection of 60 dollars, and there is evidence in the record before me that his murderous conduct was planned. Based on his own testimony at the 2004 hearing, Mr. Mosley had almost finished the yard work he was hired to do, but he wanted Mr. Wallace to pay him the remaining

money, a total of 60 dollars, before he finished the work. He told the Board that the day before the murder, he asked Mr. Wallace for an advance of the money but Mr. Wallace said no. According to statement of facts as read at the 2004 hearing, Mr. Mosley "anticipat[ed]" that Mr. Wallace would again refuse him, so the next morning he armed himself with a kitchen knife before showing up at Mr. Wallace's home and again trying to collect the money from him. Just as Mr. Mosley thought, Mr. Wallace said no the second time and Mr. Mosley then attacked him with the knife, stabbing him multiple times until he died. After the slaying, Mr. Mosley demonstrated extreme dispassion and callousness by going home, changing clothes, and then returning with a friend to steal from Mr. Wallace's home. According to a police report, Mr. Wallace's friend told police that while they were burglarizing the home, it was necessary for them to step around Mr. Wallace's dead body on the garage floor to remove some of the property. The evidence before me of Mr. Mosley's premeditation, his exceedingly trivial motive and his conduct after the murder, namely burglarizing Mr. Wallace's home, are more than sufficient to conclude that the murder he committed was especially heinous. And this factor alone is sufficient to conclude at this time that his release from prison would pose an unreasonable public safety risk.

Both the Alameda County District Attorney's Office and the Oakland Police Department sent letters to the Board opposing Mr. Mosley's "mixed performance while in prison."

Although Mr. Mosley has been in prison more than 19 years now and has made creditable gains during

this time, after carefully considering the very same factors the Board must consider, I believe his release from prison would pose an unreasonable risk of danger to society at this time. Accordingly, I REVERSE the Board of Prison Terms' 2004 decision to grant parole to Mr. Mosley.

Decision Date: 03/15/05

/s/ Arnold Schwarzenegger
ARNOLD SCHWARZENEGGER
Governor, State of California

Case3:05-cv-04260-TEH Document 43 Filed 12/21/10
Page 1 of 8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RON MOSLEY, Petitioner, v. S. OROSKI, Respondent.	)	NO. C05-4260 TEH **ORDER GRANTING MOTION FOR BAIL**

This matter came before the Court on December 21, 2010, on Petitioner Ron Mosley's motion for bail. After carefully considering the parties' written and oral arguments, the Court now GRANTS the motion for the reasons discussed below.

BACKGROUND

After pleading guilty to second-degree murder, Mosley was sentenced on December 27, 1985, to a prison term of fifteen years to life, with a minimum parole eligibility of ten years. He is currently housed at San Quentin State Prison.

On October 24, 2004, the California Board of Prison Terms conducted Mosley's fourth parole review hearing. The panel recommended that Mosley be released on parole, and the Board formally approved Mosley for parole on February 19, 2005. However, Governor Arnold Schwarzenegger reversed the Board's grant of parole on March 15, 2005.

This Court denied Mosley's challenge to the Governor's reversal on May 1, 2007, and Mosley timely appealed. On November 24, 2010, the United States Court of Appeals for the Ninth Circuit "reverse[d] and remand[ed] with instructions to the district court to grant the writ, ordering the Governor's decision vacated and the Board's February 2005 decision reinstated." *Mosley v. Oroski*, Nos. 08-15327 & 08-15389, 2010 WL 4813677, at *2 (9th Cir. Nov. 24, 2010) (footnote omitted). The appellate court determined that "'some evidence' of present dangerousness is lacking," *id.*, and also concluded that "[t]he record indicates that Mosley matured emotionally and had sincere remorse regarding the offense, and that he had realistic plans for release," *id.* at *1 n.3. However, the court has yet to issue the mandate, and Respondent Vincent Cullen, acting warden at San Quentin State Prison ("Warden"), has moved to stay issuance of the mandate pending an anticipated petition for a writ of certiorari before the United States Supreme Court.

On December 14, 2010, the appellate court remanded this case to this Court "for the limited purpose of determining whether petitioner is entitled to bail or release pending final resolution of the case." Ex. A to Loeb Decl. in Supp. of Mot. for Bail. Mosley filed a motion for bail the following day, and this Court granted Mosley's motion to shorten time. Mosley also filed a timely supplemental brief, as ordered by this Court, proposing conditions for Mosley's release. The Warden filed a timely opposition on December 17, 2010, and Mosley filed a timely reply on December 20, 2010.

LEGAL STANDARD

Rule 23 of the Federal Rules of Appellate Procedure governs "release on bail of state prisoners seeking habeas corpus relief in federal court." *Marino v. Vasquez*, 812 F.2d 499, 507 (9th Cir. 1987). Where, as here, "a decision ordering the release of a prisoner is under review, the prisoner must – unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise – be released on personal recognizance, with or without surety." Fed. R. App. P. 23(c). The presumption of release pending appeal "can be overcome if the traditional factors regulating the issuance of a stay weigh in favor of granting a stay." *O'Brien v. O'Laughlin*, 130 S. Ct. 5, 6 (2009) (citations omitted) (Breyer, Circuit Justice 2009).

> These factors are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, which, in this context [where the Court of Appeals granted the habeas petition], means that it is reasonably likely that four Justices of [the Supreme] Court will vote to grant the petition for writ of certiorari, and that, if they do so vote, there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The Warden argues that the presumption established by Rule 23(c) does not apply in this case because the appellate court ordered that the Board's decision finding Mosley suitable for parole be reinstated, not that Mosley be released, and there is therefore no "decision ordering the release of a prisoner." Fed. R. App. P. 23(c). The Court rejects this argument. Unless the Board were to institute rescission proceedings, *see Mosley*, 2010 WL 4813677, at *2 n.4, the consequence of reinstating the Board's suitability finding would be release, and the Warden has cited no authority for the proposition that only an order for immediate release of a prisoner gives rise to the Rule 23(c) presumption. Moreover, even if the presumption did not apply, the four factors set forth above favor Mosley's release for the reasons discussed below.

DISCUSSION

The procedural posture of this case appears to be materially indistinguishable from the circumstances considered by the Ninth Circuit in two recent cases. In *Hayward*, the Ninth Circuit considered Hayward's habeas petition based on then-Governor Gray Davis's decision to overturn a grant of parole by the Board. *Hayward v. Marshall*, 603 F.3d 546, 550 (9th Cir. 2010) (en banc). Although the en banc panel ultimately affirmed the district court's denial of the petition, *id.* at 563-64, the three-judge panel initially reversed the district court and remanded the case with instructions to grant the writ, *Hayward v. Marshall*, 512 F.3d 536, 548 (9th Cir. 2008), *overruled by Hayward*, 603 F.3d 546 (9th Cir. 2010) (en banc). While the en banc proceedings were

pending, Hayward was released on bail. *Hayward*, Case No. 06-55392, Order (docket no. 41) (9th Cir. Jan. 3, 2008); *Hayward v. Marshall*, Case No. C05-7239-GAF, Civil Minutes for Hearing re: Conditions of Release (C.D. Cal. Jan. 30, 2008) (Ex. A to Pet'r's Supp. Brief Re: Conditions of Release).

Similarly, in *Pearson*, the Ninth Circuit also considered a habeas petition challenging the Governor's reversal of a grant of parole by the Board. *Pearson v. Muntz*, 625 F.3d 539, 546 (9th Cir. 2010) (per curiam). The district court had granted Pearson's habeas petition "and issued an order requiring the State to release Pearson within thirty days." *Id.* The appellate court originally stayed the district court's order for Pearson's release pending appeal while the court's en banc proceedings in *Hayward* were ongoing. *Id.* After *Hayward* was decided, however, the Ninth Circuit lifted the stay on Pearson's release pending appeal. *Id.* at 550.

The Warden's opposition papers fail to distinguish – or even attempt to distinguish – *Hayward or Pearson*. The Warden does cite another recent Ninth Circuit case in which the appellate court granted a stay of a district court's release order pending appeal, *Haggard v. Curry*, --- F.3d ---, 2010 WL 4978842 (9th Cir. 2010), but that case involved a habeas petition challenging a decision by the Board to deny parole, and not a Governor's reversal of the Board's grant of parole, *id.* at *1. Although the Ninth Circuit stayed the district court's order to release Haggard pending appeal, the court's analysis relied on its conclusion that "where the Board's parole denial decision is not based on 'some evidence' of current dangerousness, the California-created but federally enforceable, liberty interest in parole gives the prisoner only the right to a redetermination by

the Board consistent with the state's 'some evidence' requirement, not the right to release on parole." *Id.* at *5. The court explicitly did "not consider the contours of inmates' federally protected liberty interest in cases [like Mosley's] involving gubernatorial vetoes," but noted that "[a]t least one published California appellate opinion . . . has held that reinstatement of the Board's release order, rather than remand to the Governor, is appropriate when the Governor's veto decision fails to meet the state's 'some evidence' standard." *Id.* at *4 n.3 (citing *In re McDonald*, --- Cal. Rptr. 3d ---, 2010 WL 4296703 (Ct. App. Nov. 2, 2010)). *Haggard* therefore does not alter the conclusion reached by the Ninth Circuit in *Hayward* and *Pearson* that a petitioner who successfully challenges the Governor's reversal of a grant of parole by the Board is entitled to release pending appeal.

Even in the absence of such precedent, this Court would still find that Mosley should be released pending appeal based on application of the *Hilton v. Braunskill* factors for granting a stay. The first such factor is likelihood of success on the merits, "which, in this context, means that it is reasonably likely that four Justices of [the Supreme] Court will vote to grant the petition for writ of certiorari, and that, if they do so vote, there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *O'Brien*, 130 S. Ct. at 6. In this case, the Warden has made no argument, let alone showing, of the first part of this test: that it is reasonably likely that four Justices will vote to grant a petition for writ of certiorari. The Warden has not, for example, cited any evidence of a split among the circuits or a conflict between Ninth Circuit authority and the decision of any state court of last resort. *See*

Sup. Ct. R. 10 (explaining considerations governing review on certiorari, which "will be granted only for compelling reasons").

As to whether the Supreme Court would reverse the Ninth Circuit's decision if it were to grant certiorari, the Warden repeats arguments that the state has repeatedly made: that "California inmates do not have a federal liberty interest in parole," and that "no clearly established United States Supreme Court precedent requires that parole decisions be supported by some evidence." Opp'n at 3-6. The Ninth Circuit squarely rejected both arguments in *Pearson*, 625 F.3d at 547, explaining that "[w]hat the State fails to recognize . . . is that state-created rights may give rise to liberty interests that may be enforced as a matter of federal law. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). . . . The principle that state law gives rise to liberty interests that may be enforced as a matter of federal law is long-established." The court further explained that, "[h]aving guaranteed the prisoners of the state that they will not be denied a parole release date absent 'some evidence' of current dangerousness, California is not permitted under the federal Constitution arbitrarily to disregard the 'some evidence' requirement in any particular case." *Id.* at 550. The Warden has failed to persuade the Court of any likelihood that the Supreme Court will grant a writ of certiorari and reverse Pearson and the other cases on which the appellate decision in this case rests. *See Mosley*, 2010 WL 4813677, at *2-3 (explaining that *Hayward, Pearson*, and two other cases – *Pirtle v. Cal. Bd. of Prison Terms*, 611 F.3d 1015 (9th Cir. 2010), and *Cooke v. Solis*, 606 F.3d 1206 (9th Cir. 2010) – "have . . . settled the existence of a California

prisoner's liberty interest in parole and the right to parole in the absence of 'some evidence' of future dangerousness under state law").

Turning to the remaining *Hilton v. Braunskill* factors, the Warden also incorrectly weighs the injury to the state if release is granted, the injury to Mosley if release is denied, and where the public interest lies. First, the Warden mistakenly relies on the Ninth Circuit's decision in *Haggard*, which, as explained above, concerned review of the denial of parole by the Board, not a reversal of the grant of parole by the Governor. This distinction is material because the remedy in the latter case is not a return to the Governor or to the Board, but instead reinstatement of the Board's decision finding the petitioner suitable for parole. *E.g.*, *Mosley*, 2010 WL 4813677, at *4-5. Thus, unlike in *Haggard*, the Ninth Circuit's decision that a writ must be granted in this case requires that Mosley be released, not simply that he receive a new parole hearing. Mosley's interest in release – and the injury he will suffer if release is not granted – is therefore substantially greater than that considered by the *Haggard* court. *See, e.g.*, *Mezhbein v. Salazar*, Case No. CV 06-8059-DOC (MLG), 2008 WL 1908533, at *3 (C.D. Cal. Apr. 27, 2008) ("[I]f the stay [of a release order pending appeal] is granted, Petitioner will face a prolonged period of continued incarceration when the Court has already determined that the denial of parole was not supported by the evidence. There can be no doubt that a stay will substantially injure Petitioner.").

The Warden also premises his argument on the assumption that Mosley will endanger public safety if he is released. However, the Ninth Circuit has already determined that, as of the Governor's March 2005 reversal of the Board's grant of parole, there

was no evidence that Mosley was currently dangerous. *Id.* at *4. Although the Warden argues that the Board has found Mosley unsuitable for parole at four subsequent hearings,[1] he presents no evidence that the Board relied on any additional evidence showing current dangerousness. To the contrary, there is no indication in the record that Mosley has had any disciplinary infractions since 2004, that more recent psychological evaluations of Mosley have been less favorable, that his post-release plans have become less stable, or that any other material facts indicate that Mosley is less suitable for parole today than when the Board found him suitable in 2004.[2] The state and the public therefore have no interest in Mosley's continued incarceration, particularly where, as here, the Warden presents no argument or evidence that Mosley is a flight risk. Any claimed injury resulting from failure to respect the parole system's determinations of Mosley's unsuitability for parole "is self-inflicted." *Mezhbein*, 2008 WL 1908533, at *2.

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[1] Mosley objects to the Court's consideration of the two documents attached to the Hooley declaration: a status report showing Mosley's subsequent denials of parole and a copy of the decision from Mosley's most recent parole hearing on September 17, 2009. The Court finds these objections to be moot because it concludes that release is appropriate even if the subsequent parole denials are considered.

[2] Although the record in this case does not contain evidence of Mosley's subsequent history, the Warden notably failed to rebut Mosley's contentions at the hearing that his prison record has been exemplary, that he has undergone a series of rehabilitative programming, and that his most recent psychological evaluation gave him the lowest possible risk rating.

Mosley has served twenty-five years on his fifteen-years-to-life sentence, and the Ninth Circuit has determined that Mosley should have been released five years ago because there was no evidence that he was currently dangerous at the time. Nothing in the record indicates that a contrary conclusion should be reached today, and the Court therefore finds the balance of equities, as well as the public interest, to weigh substantially in Mosley's favor. The Court refers this matter to the General Duty Magistrate Judge to set appropriate conditions for bail.

CONCLUSION

For the reasons discussed above, Mosley's motion for bail is GRANTED. IT IS HEREBY ORDERED that:

1. The Warden shall release Mosley upon (1) posting of an appearance bond in the amount of $100,000, secured by affidavits of surety without justification signed by Mosley's mother, Hilda Smith, and sister, Francine Tournour, or other sureties determined to be suitable by the General Duty Magistrate Judge, and (2) the setting of conditions of release as determined appropriate by the General Duty Magistrate Judge.

2. This Court leaves it to the General Duty Magistrate Judge's discretion whether to require Mosley's personal appearance to acknowledge the ordered conditions of release, or to allow counsel to make other arrangements to expedite Mosley's release. If the General Duty Magistrate Judge requires a personal appearance, then the Warden shall produce Mosley for a hearing before the General Duty Magistrate Judge within seven days of the date of this order.

3. This order shall remain in effect until the United States Court of Appeals for the Ninth Circuit has issued it mandate and the time for the Warden to file a petition for writ of certiorari in the United States Supreme Court has expired or, if the Warden files a petition for writ of certiorari, until the petition for writ of certiorari and any subsequent briefing on the merits are ruled upon by the United States Supreme Court. If the decision directing this Court to grant Mosley's petition for writ of habeas corpus is reversed, Mosley shall abide by that decision by surrendering himself to state custody within 24 hours of any such decision.

4. Any violation of any of the conditions imposed by the General Duty Magistrate
Judge or by this Court shall subject Mosley to immediate arrest.

5. As soon as possible, the Clerk shall provide a copy of this order to the General Duty Magistrate Judge and to Pretrial Services, which unless otherwise ordered by this Court or the General Duty Magistrate Judge, shall be responsible for supervising Mosley's release as long as this order remains in effect.

IT IS SO ORDERED.

Dated: 12/21/10

/s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 12 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

MICHAEL CRAIG SLATER,
Petitioner - Appellee,
v.
WILLIAM SULLIVAN,
Warden,
Respondent - Appellant,
and
JAMES E. TILTON, Secretary of California Department of Corrections & Rehabilitation,
Respondent.

No. 09-17784

D.C.No. 1:08-cv-00571-OWW-JMD
U.S. District Court for Eastern California, Fresno

MANDATE

The judgment of this Court, entered October 20, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court
Lee-Ann Collins
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 20 2010
Molly C. Dwyer,
Clerk
U S Court of Appeals

MICHAEL CRAIG SLATER,

Petitioner - Appellee,

v.

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JAMES E. TILTON, Secretary of California Department of Corrections & Rehabilitation,

Respondent.

No. 09-17784

D.C.No.CV-08-00571-OWW-JMD

MEMORANDUM*

Appeal from the United States District Court

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

For the Central District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted October 5, 2010
San Francisco, California

Before: KLEINFELD and GRABER, Circuit Judges, and MOLLOY**, District Judge.

Respondent William Sullivan, Warden, (the "State") appeals the district court's grant of Petitioner Michael Craig Slater's habeas corpus petition under 28 U.S.C. § 2254. The district court held that the State deprived Petitioner of his right to due process when he was denied parole in the absence of "some evidence" of current dangerousness as required by California law. On de novo review, Buckley v. Terhune, 441 F.3d 688, 694 (9th Cir. 2006) (en banc), we affirm.

In a series of recent cases, we have rejected the State's argument that the Antiterrorism and Effective Death Penalty Act of 1996 precludes relief on Petitioner's claim because California's "some evidence" requirement is not "clearly established federal law." Hayward v. Marshall, 603 F.3d 546, 563 (9th Cir. 2010) (en banc); Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010); Pearson v. Muntz, 606 F.3d 606, 608-09 (9th Cir. 2010) (per curiam). The State argues, in essence, that those cases were wrongly decided, but they bind this three-judge panel. Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation

The State does not argue that the Board of Parole Hearings' decision was, in fact, supported by some evidence. We therefore do not consider that question. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) (holding arguments not raised in the opening brief generally are waived).

AFFIRMED.

Slater v. Sullivan, No. 09-17784
KLEINFELD, Circuit Judge:

FILED
OCT 20 2010
Molly C. Dwyer,
Clerk
U S Court of Appeals

I respectfully dissent. The district court's grant of the writ was based on a line of reasoning that was rejected by our court earlier this year in Hayward v. Marshall, 603 F.3d 546, 559-61 (9th Cir. 2010) (en banc). The recent applications of Hayward in Pearson v. Muntz, 606 F.3d 606 (9th Cir. 2010) (per curiam), and Cooke v. Solis, 606 F.3d 1206 (9th Cir. 2010), do not purport to overrule Hayward, nor could they, since they are not en banc. Hayward did "not decide whether a right arises in California under the United States Constitution to parole in the absence of some evidence of future dangerousness." Hayward, 603 F.3d at 562. It cannot be read to allow for us to become something akin to a state parole board or appellate court. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1-2); Estelle v. McGuire, 502 U.S. 68, 72 (1991).

In this case, the California superior court assessed the distinct rationales given by the Board of Parole Hearings, addressed the most direct and on-point rationale that was not out of bounds under its state's case law, and concluded that Slater was currently dangerous because his repeated explanation for the murder showed a current state of mind indicating that he would be dangerous if released. See In re Scott, 15 Cal. Rptr. 3d 32, 40 (Ct. App. 2004). In addition to the crime of conviction and his continuing failure to take responsibility, the

parole board's finding of future dangerousness was supported by Slater's escalating pattern of criminal behavior before he came to prison and his "tenting" infraction while he was imprisoned. We are not at liberty to disregard "tenting" as though it were insignificant evidence of future dangerousness. The parole board took explicit notice of it, no doubt because "tenting" is both an infraction and a possible means by which prisoners may shield themselves from surveillance while they commit more serious infractions and crimes. The superior court did not purport to reject any of the parole board's reasons for denying parole, although it did not mention them all.

The summary affirmances by California's court of appeal and supreme court indicate that the reasons given by the parole board and superior court are enough to satisfy California's "some evidence" standard of review. See In re Lawrence, 44 Cal. 4th 1181, 1214 (2008) (noting that the inmate's criminal offense alone cannot establish his current dangerousness "unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state" supports an inference of dangerousness); In re Shaputis, 44 Cal. 4th 1241 (2008) (same). There is no showing that California violated the holdings of the Supreme Court, or made an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d)(1-2); Hayward, 603 F.3d at 559-61.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 23 2009
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U S Court of Appeals

MICHAEL CRAIG SLATER,
Petitioner - Appellee,
v.
WILLIAM SULLIVAN,
Warden; et al.
Respondent - Appellant,

No. 09-17784

D.C.No. 1:08-cv-00571-OWW-JMD
U.S. District Court for Eastern California, Fresno

ORDER

Before: GOODWIN and CLIFTON, Circuit Judges.

Appellants' motion to stay the district court's November 20, 2009 order pending appeal is denied. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009) (order).

The briefing schedule established previously shall remain in effect.

Case 1:08-cv-00571-OWW-JMD Document 29
Filed 12/18/2009 Page 1 of 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL CRAIG SLATER, Petitioner, v. WILLIAM SULLIVAN, et al., Respondents.	1:08-CV-00571 OWW JMD HC ORDER DENYING RESPONDENT'S MOTION FOR A STAY PENDING APPEAL ORDER GRANTING RESPONDENT'S MOTION FOR TEMPORARY STAY TO PETITION NINTH CIRCUIT FOR A STAY

Petitioner is a State prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On July 27, 2009, the Magistrate Judge issued a Findings and Recommendation, recommending that the petition for writ of habeas corpus be granted. (Court Doc. 20). On November 20, 2009, the petition for writ of habeas corpus was granted, adopting the findings and recommendation in full. (Court Doc. 23). The order provided:

> The California Board of Parole Hearings shall find Petitioner suitable for parole unless, within 30 days of the finality of this

> decision, the Board holds a hearing and determines that new evidence of his conduct in prison or change in mental status subsequent to the October 2005 parole consideration hearing is sufficient to support a finding that Petitioner currently poses an unreasonable risk of danger to society if released on parole. In the absence of any such new evidence showing Petitioner poses a current risk of danger to society based on new evidence, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has lapsed, Respondent shall, within 10 days of the Board's hearing, either release petitioner forthwith if his release date lapsed more than three years earlier, or release petitioner on parole for that period of his three year parole term that remains if the release date lapsed less than three years earlier.

(Court Doc. 23 at 8-9).

On December 4, 2009, Respondent submitted a motion to this Court to stay the Court's November 20, 2009 order. (Court Doc. 25). Alternatively, Respondent asked for a *five day* stay of the proceedings to permit application for interim relief pending appeal.

Petitioner filed objections to Respondent's motion on December 7, 2009. (Court Doc. 27).

DISCUSSION

Respondent argues that the balancing of the factors articulated in *Hilton v. Braunskill*, 481 U.S.

770, 776 (1987) weighs in favor of the Court exercising its discretion to issue a stay. (Court Doc. 26 at 2). The factors to be weighed in deciding whether to issue a stay of release, which are generally the same as those governing stays of civil judgment, are: (1) whether the applicant has made a strong showing that he/she is likely to succeed on the merits; (2) whether the applicant will be irreparable injured absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and (4) where the public interest lies. *Hilton*, 481 U.S. at 776.

1. Showing of Prevailing on the Merits

Respondent's discussion of the likelihood of success on the merits relies heavily on the same arguments Respondent raised in the objections to the findings and recommendation – namely arguing again that there is no clearly established federal law requiring that some evidence support the denial of parole, that application of the some evidence standard was not objectively unreasonable by the State court, and that the Court's November 20, 2009 order contained an improper remedy. (See Court Doc. 21). As articulated by the November 20, 2009 order, these arguments are unavailing under current Ninth Circuit law; therefore, the Court rejects Respondent's contention that he is likely to prevail on the merits on appeal.

2. Irreparable Harm to Respondent

Respondent next argues that the Board,[1] the Governor, and the entire California parole system,

[1] All subsequent references to the Board refer to the California Board of Parole Hearings.

will be irreparable injured absent a stay. Respondent argues that the remedy ordered by the Court irreparably harms the Governor as it usurps the executive's legislatively mandated functions. Additionally, Respondent argues that the remedy would force the Board to apply parole credits not available under California law, thereby harming the parole system. Lastly, Respondent argues that the State's interest in public safety will be irreparable injured. The Court addresses Respondent's respective argument below.

A. Usurping Executive Function

Respondent argues that, "an order directing the Board to release Slater without allowing the Governor an opportunity to review its decision usurps the constitutional and legislative mandates with which the Governor is charged." (Court Doc. 25 at 6). This argument has been rejected by several district court. *See Urieta v. Curry*, No. C 07-3935 RMW, 2009 WL 3618704, *2 (N.D. Cal. Oct. 29, 2009)(noting that "the futility of remanding a parole case for re-review when a habeas court has already reviewed the evidence and found it insufficient to sustain an unsuitability finding has been rejected in both the state and federal courts"); *see, e.g.*, *Blankenship v. Kane*, No. C 04-5450 CW, 2007 WL 2214102 at *3-4 (N.D. Cal. July 30, 2007) (concluding a remand to the Governor after already reversing the Governor's decision rejecting the Board's parole grant would be clear error); *In re Burdan*, 169 Cal.App.4th 18, 29 (Cal. Ct. App. 2008). The Court finds the rationale of these courts persuasive and therefore finds no irreparable harm would result to the governor.

B. Harm to Parole System

Respondent argues that the parole system will be irreparably harmed as the remedy would apply parole credits not available under California law. (Court Doc. 26 at 6). In support of this contention, Respondent cites *In re Chaudhary*, 172 Cal.App.4th 32, 37 (Cal. Ct. App. 2009), arguing that the State appellate court's decision should be read to preclude a federal habeas court from allowing time spent in prison to satisfy the five year parole discharge eligibility requirement contained in California Penal Code Section 3000.1.[2] *Chaudhary* stated that:

> [California Penal Code] Section 3000.1's five-year parole discharge eligibility requirement is expressly limited to the period of time after the parolee "has been released on parole" and requires that the parolee serve five continuous years on parole "since [the parole's] release from confinement." By placing these explicit limitations on the parole discharge eligibility requirement, the Legislature made unmistakably clear that a parolee must first have "been released on parole" and must then complete five continuous years on parole after the parolee's "release from confinement." This intent explicitly precludes the application of any time spent in custody prior to release to satisfy any

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[2] The November 20, 2009 order adopting and the July 27, 2009 findings and recommendation mistakenly stated that the parole discharge eligibility requirement was three years. Respondent is correct that the time period for parole discharge in Petitioner's case is five years. However, the error is neither material to the Court's order granting parole.

> part of section 3000.1's five-year parole discharge eligibility requirement.

Id. at 36-37.

As noted by the district court in *Thompson v. Carey*, No. CIV S-05-1708 GEB EFB, 2009 WL 1212202, *4 (E.D. Cal. May 05, 2009), *Chaudhary* rationale is inapplicable to a federal habeas court's fashioning of an appropriate remedy:

> [N]either respondent nor the *Chaudhary* court addressed the federal due process ramifications of a prisoner, such as petitioner, being excessively confined for several years. Application of Section 3000.1 in the manner suggested by respondent and the *Chaudhary* court would leave those prisoners without any effective remedy for their unconstitutional confinement. The Ninth Circuit's ruling in *McQuillion v. Duncan*, 342 F.3d 1012, 1015 (9th Cir.2003) ("McQuilliam II") suggests that such an application is not constitutionally acceptable... [¶]Although the *Chaudhary* court distinguished *McQuillion* on the grounds that *McQuillion* was subject to a fixed parole period, not lifetime parole, the *Chaudhary* court did not acknowledge the rationale set forth in *McQuillion*: that a prisoner who is unconstitutionally confined should be given credit for that time and placed in the position he would have been in had he been released on time. *McQuillion* II, 342 F.3d at 1015; *see also Carlin v. Wong*, 2008 WL 3183163, at *2 (N.D. Cal. Aug. 4, 2008) ("[T]he court finds that the actual surplus time that petitioner has been incarcerated

> beyond his parole date should be credited toward his post-release parole period."); *Martin v. Marshall*, 448 F.Supp.2d 1143, 1145 (N.D. Cal. 2006) (finding that the actual surplus time petitioner served in prison should be deducted from his parole period).

In light of the fact that federal habeas courts have "broad discretion in conditioning a judgment granting habeas relief" and "dispos[ing] of habeas corpus matters 'as law and justice require,'" *Hilton*, 481 U.S. at 775, the Court finds the rationale in Thompson persuasive. See also *Milot v. Haws*, 628 F.Supp.2d 1152, 1157-1158 (C.D. Cal. June 8, 2009) (citing *McQuillion* II, 342 F.3d at 1015 and *Burnett v. Lampert*, 432 F.3d 996, 1000 (9th Cir. 2005), in rejecting Respondent's contention that the district court had no authority to credit petitioner for time spent on parole and ordering as a remedy that the Board "release petitioner on parole for that period of his three year parole term that remains if the release date lapsed less than three years earlier"). Consequently, the Court finds Respondent's argument that the parole system will be irreparably injured because credits toward a parole term are unavailable under state law unpersuasive. *See Urieta*, 2009 WL 3618704 at *3.

C. Public Safety Interest

The Court's November 20, 2009 order and the findings and recommendation issued on July 27, 2009, make clear that there was no evidence in the record to support a determination that Petitioner poses a current risk of danger to the public safety. The remedy ordered provided opportunity by the Respondent to introduce a new showing that

Petitioner posed a current risk of danger to society if such evidence existed at the time of the hearing. Respondent's argument that the public interest will be harmed if the Court denies a stay is speculative at best.

3. Injury to Petitioner

Respondent argues that the injury to Petitioner would not substantially injure Petitioner as Petitioner is serving an indeterminate life term "for which he is seeking early release on parole." (Court Doc. 26 at 7). "To remain in prison after a successful habeas petition injures [Petitioner] and extends the due process violation already recognized by the court." *McCullough v. Kane*, No. C 05-02207 MHP, 2008 WL 512709, *6 (N.D. Cal. Feb. 25, 2008) (noting that long delay in appellate process weighs in favor of release); *see Mezhbein v. Salazar*, No. CV 06-8059-DOC-MLG, 2008 WL 1908533, *3 (C.D. Cal. April 27, 2008) (stating, "[a] stay pending appeal will substantially harm Petitioner...if the stay is granted Petitioner will face a prolonged period of continued incarceration when it has been determined that the denial of parole was not supported by the evidence. There can be no doubt that a stay will substantially injure Petitioner"); *see also Saldate v. Adams*, 573 F.Supp.2d 1303, 1315 (E.D. Cal. July 10, 2008) (rejecting Respondent's argument that a stay would not substantially injure Petitioner because of Petitioner's indeterminate life sentence and finding that a stay under the *Hilton* factors was not appropriate.)

4. Public Interest

Likewise, Respondent's argument that "the public has an interest in the Board's decision

remaining undisturbed during the pendency of the appeal" is unconvincing. *See McCullough*, 2008 WL 512709 at *6 (citing *Biggs v. Terhune*, 334 F.3d 910, 916-917 (9th Cir. 2003) in noting that "the public has an interest in rewarding an inmate's rehabilitation and positive conduct"); *see also Saldate v. Adams*, 573 F.Supp.2d at 1315 (finding Respondent has failed to establish that public interest weighed in favor of granting stay based on argument that public interest has interest in ensuring that decisions by the Board remain undisturbed).

CONCLUSION

After reviewing the *Hilton* factors, a stay is inappropriate. Respondent has not made a sufficient showing that he likely to succeed on appeal nor has he shown irreparable injury. Conversely, Respondent has not established sufficiently that 'Petitioner will not be harmed and has failed to establish that the public interest clearly lies in favor of a stay such that a stay should be issued by the Court. Thus, Respondent has not adequately met its "difficult burden" of showing that a stay of this Court's order is necessary. *See Hilton*, 481 U.S. at 776; *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1994). Respondent's application for a stay pending appeal is DENIED.

Additionally, Respondent's alternative motion for a temporary stay of the November 20, 2009 Order Grating Habeas Petition to allow him to seek a stay from the Ninth Circuit is GRANTED. The temporary stay will last until *five days* from the date of this order so that Respondent may file in the Ninth Circuit an application for a stay or any other application for interim relief pending the appeal. *See* 9th Cir. R. 27-2.

IT IS SO ORDERED.

Dated: December 17, 2009

/s/ Oliver W. Wanger
United States Magistrate Judge

Case: 1:08-cv-00571-OWW-JMD Document 24
Filed 11/20/2009 Page 1 of 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL CRAIG SLATER,

v.

WILLIAM SULLIVAN,

JUDGMENT IN A CIVIL CASE

Case No. **1:08-CV-00571-OWW-JMD**

XX — **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 11/20/2009

Victoria C. Minor
Clerk of the Court

ENTERED: **November 20, 2009**

by: */s/ A. Bradley*
Deputy Clerk

Case 1:08-cv-00571-OWW-JMD Document 23
Filed 11/20/2009 Page 1 of 9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL CRAIG SLATER, Petitioner, v. WILLIAM SULLIVAN, et al., Respondents.	1:08-CV-00571 OWW JMD HC ORDER ADOPTING FINDINGS AND RECOMMENDATION [Doc. 20] ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Magistrate Judge issued a Findings and Recommendation on July 27, 2009, recommending that the petition for writ of habeas corpus be GRANTED. The Magistrate Judge further recommended that the Clerk of Court be DIRECTED to enter judgment.

Respondent filed objections to the Findings and Recommendation on August 31, 2009.

Petitioner filed a response to Respondent's objections on September 8, 2009.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file and having carefully considered the objections, the Court concludes that the Magistrate Judge's Findings and Recommendation is supported by the record and proper analysis. The Court modifies the Findings and Recommendation to include the following analysis in light of Respondent's objections. *See* 28 U.S.C. § 636(b)(1)(C) ("[a] judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge").

A. Some Evidence Analysis

Respondent objects to the Magistrate Judge's Findings on the grounds that: (1) the Magistrate Judge erred in finding that the "some evidence" standard is applicable to this case; and (2) the Magistrate Judge erred in determining that the State court decision was unreasonable under the some evidence standard.

1. Applicability of Some Evidence Standard

Respondent's objections to the Findings and Recommendation raises the same argument previously contained in Respondent's answer: specifically, that there is no clearly established federal law requiring the application of the some evidence standard to the State's denial of parole. Respondent asks the Court to disregard the plethora of Ninth Circuit authority which holds that the some evidence standard is clearly established federal law and applicable to parole cases under AEDPA. *See, e.g., Sass v. Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006) (applying some evidence standard).

Respondent contends that the United States Supreme Court's precedents require only a hearing and a statement of reasons for the denial of parole. (Resp't. Objections at 3) (citing *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 16 (1979)).

Ninth Circuit precedent may be persuasive authority for purposes of determining whether a particular State court decision is an unreasonable application of Supreme Court law, and may also help determine what law is clearly established. *Sims v. Rowland*, 414 F.3d 1148, 1151 (9th Cir. 2005), *cert. denied*, 546 U.S. 1066 (2005). In *Sass*, the Ninth Circuit explicitly rejected the argument Respondent raises in its objections, stating:

> Hill's some evidence standard is minimal, and assures that "the record is not so devoid of evidence that the findings of the ... board were without support or otherwise arbitrary." (citation omitted). Hill held that although this standard might be insufficient in other circumstances, "[t]he fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." (citation omitted). To hold that less than the some evidence standard is required would violate clearly established federal law because it would mean that a state could interfere with a liberty interest--that in parole—without support or in an otherwise arbitrary manner. We therefore reject the state's contention

> that the some evidence standard is not clearly established in the parole context

Sass, 461 F.3d at 1129.

Additionally, the Court notes that Respondent fails to cite any district or Circuit authority for the proposition that the some evidence standard is not clearly established federal law in the parole context.[1] Rather, the Court's review has found that an overwhelming number of district courts, including this district, currently hold that the some evidence standard is the applicable law for parole cases. *Ramos v. Cary*, 2009 WL 2425715, *3-4 (E.D. Cal. 2009) (applying some evidence standard); *Grant v. Salazar*, 2009 WL 2566947, *5-6 (C.D. Cal. 2009) (same); *Kler v. Board of Prison Terms*, 2009 WL 2591250, * 3-5 (E.D. Cal. 2009) (same). In light of the fact that no district court has rejected the some evidence standard as the applicable standard in parole cases, and given the Ninth Circuit's decisions in *Irons v. Carey*, 505 F.3d 846, 850-851 (9th Cir. 2007), *Sass v. California Board of Prison Terms*, 461 F.3d 1128-1129 (9th Cir. 2006) (finding some evidence standard is "clearly established in the parole context"), and *Biggs v. Terhune*, 334 F.3d 910,

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[1] Respondent cites *Hayward v. Marshall*, 512 F.3d 536, 542, 545, 547 (9th Cir. 2008), for the proposition that it is improper for this Court to rely on *Irons* and *Biggs* as those decisions form the foundation for *Hayward* and *Hayward* is being review en banc. The Court notes that Ninth Circuit rules forbid use of a decision currently being reviewed en banc as precedent. Further, the Court finds Respondent's argument both speculative and unpersuasive. The Ninth Circuit's review of *Hayward* does not implicate the ability of *Biggs* and *Irons* to serve as precedents.

914 (9th Cir. 2003), the Court finds Respondent's argument unpersuasive.

2. Application of the Some Evidence Standard

Respondent argues, in the alternative, that the Magistrate Judge incorrectly applied the some evidence standard. Respondent posits two arguments in support of this contention, contending that: (1) the Magistrate Judge should not have applied State law as errors of State law do not provide a ground for habeas corpus relief; and (2) there was some evidence to support the Board's denial of parole. As the Magistrate Judge's Findings and Recommendation already articulate the reasons why the Board's denial of parole was not supported by some evidence, the Court will only address Respondent's first contention.

While it is true that errors of State law are generally not grounds for habeas corpus relief, Respondent's argument ignores the unique nature of Petitioner's due process claim. The Due Process Clause of the United States Constitution does not confer on state prisoners a liberty interest in a parole release date. *E.g.*, *Greenholtz*, 442 U.S. at 7 ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"). However, where a State statute creates a presumption that parole release will be granted, such a statute may create a legitimate expectation of release sufficient to invoke the protections of the Due Process clause. *See id.* at 12. Where, as here, the liberty interest at issue is State-created, it is axiomatic that a federal habeas court must evaluate a petitioner's claim within the framework of State law. As noted by the Magistrate Judge, the Ninth Circuit has held expressly that the

inquiry of whether some evidence supports denial of parole to a prisoner requires federal courts to ascertain whether California statutes and regulations have been satisfied. *See Irons*, 505 F.3d at 851; *Biggs*, 334 F.3d at 915. Thus, a consideration of State law is pertinent in the parole context.

The California Supreme Court has interpreted California parole law to require that the some evidence standard be applied to the question of whether a prisoner poses a current risk of danger, stating that, "[t]he relevant determination for the Board and the Governor *is, and always has been*, an individualized assessment of the continuing danger and risk to public safety posed by the inmate." *In re Lawrence*, 44 Cal.4th at 1227 (emphasis added). The *Lawrence* court further noted that "current dangerousness (rather than the mere presence of a statutory unsuitability factor) is the focus of the parole decision is rooted in the governing statute." *Id.* at 1210-1211. More importantly, the State court applied this exact standard in Petitioner's case, stating that, "[t]his motive is materially less significant than those that conventionally drive people to commit murder; *therefore there is some evidence to support the Board's conclusion that petitioner continues to pose a risk of danger to society*." (Answer Ex. B at 2-3) (emphasis added). A federal habeas court must defer to a state court's interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (citing to *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) and *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). Thus, the Magistrate Judge did not err in applying the some evidence standard to the inquiry of whether Petitioner poses a current risk of danger to the public safety.

B. Improper Remedy

Respondent next contends that the remedy recommended by the Magistrate Judge is erroneous. The Magistrate Judge recommended that the remedy in this instant action be:

> Judgment be entered granting a writ of habeas corpus as follows: The Board shall find Petitioner suitable for parole at a hearing to be held within 30 days of the order adopting this decision, unless new evidence of his conduct in prison or change in mental status subsequent to the October 2005 parole consideration hearing is introduced that is sufficient to support a finding that Petitioner currently poses an unreasonable risk of danger to society if released on parole; and in the absence of any such new evidence showing Petitioner's unsuitability for parole, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has passed, Respondent shall, within ten (10) days of the Board's hearing, release Petitioner from custody. With respect to his presumptive period of parole, Petitioner is to be credited for any time that has lapsed since the release date calculated by the Board or when a finding of suitability at the October 2005 parole consideration hearing would have become final pursuant to California

> Penal Code sections 3041(b) and 3041.2(a)), whichever is later.

(Court Doc. 20 at 17-18).

Respondent contends that this remedy is erroneous because "even if a due process violation is found, the remedy should be limited to a new parole consideration review that comports with due process." (Resp't. Objections at 6) (citing *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-985 (9th Cir. 2002)). Respondent fails to acknowledge that *Benny* concerned whether the language of Title 18, United States Code, section 4211(c)(1) required an automatic termination or release as a violation of a prisoner's procedural rights contained in section 4211(c)(1). *Benny*, 295 F.3d at 982-983 (citing *Tatum v. Christensen*, 786 F.2d 959, 963 (9th Cir. 1986), *overruled by Wallace v. Christensen*, 802F.2d 1539, 1542 (9th Cir. 1986)). Thus, *Benny*'s holding is not as broad as Respondent contends, as nothing in *Benny* limits a federal habeas court's ability to grant the remedy of release on parole. Such a holding from *Benny* would be puzzling considering that the *Benny* Court found that habeas corpus was not the proper avenue for the petitioner to pursue a new parole consideration hearing. *Benny*, 295 F.3d at 989-990 (finding proper process was a writ of mandamus). More importantly, as recognized by Respondent, the Ninth Circuit has ordered the immediate release of a prisoner in an almost identical situation to the present case. In *McQuillion v. Duncan*, 342 F.3d 1012, 1016 (9th Cir. 2003), the Ninth Circuit ordered the immediate release of a prisoner whose parole rescission had not been supported by some evidence. Obviously, the ability of a federal habeas court to grant a remedy is not confined to only granting a new parole consideration hearing.

Additionally, Respondent's citation to *Clifton v. Attorney General of the State of California*, 997 F.2d 660, 665 (9th Cir. 1974) is misguided as *Clifton* concerned a delayed parole hearing which would be best remedied by an actual hearing. Here, the remedy of a new parole consideration hearing would be futile. *See Milot v. Haws*, 628 F.Supp.2d 1152, fn. 3 (C.D. Cal. 2009) (stating, "the futility of remanding a parole case for "re-review" when the habeas court already has reviewed the evidence and found it insufficient to sustain an unsuitability finding has not escaped the state or federal courts" and listing for support of this contention *Blankenship v. Kane*, No. C 04-5450 CW, 2007 WL 2214102, at *3-*4 (N.D.Cal. July 30, 2007), *In re Aguilar*, 168 Cal.App.4th 1479, 1491 (Cal. Ct. App. 2008), *In re Burdan*, 169 Cal.App.4th 18, 39, 86 Cal.Rptr.3d 549 (Cal. Ct. App. 2008)).

A plethora of California cases have deemed the remedy suggested in the Magistrate's Findings and Recommendation to be the appropriate course of action in this situation. As stated by the California Court of Appeal in *In re Rico*, 171 Cal.App.4th 659, 688 (Cal. Ct. App. 2009), this is not a case of flawed methodology requiring re-weighing of the evidence on remand. Rather, the Court has found "an absence of evidence to support the BPH's unsuitability finding. Under these circumstances, 'to proceed in accordance with due process of law' does not mean the Board, or the Governor, is to be given an opportunity to reconsider the parole decision where there is not 'some evidence' in the record to support the unsuitability finding." *Id.* (quoting *In re Burdan*, 169 Cal.App.4th at 39). The California Court of Appeal has further noted that, in accordance with the California Supreme Court's decision in *Lawrence*,

"when the reviewing court has determined there is no evidence in the record that would support the denial of parole, there is no reason to order the Board to conduct any further hearing on the matter, at least in the absence of some new evidence about the inmate's post-hearing conduct." *In re Gaul*, 170 Cal.App.4th 20, 40 (Cal. Ct. App. 2009) (citing *In re Singler*, 169 Cal.App.4th 1227, 1245 (Cal. Ct. App. 2008) (remedy after finding that Board's denial of parole is not supported by some evidence is order directing Board to find prisoner suitable for parole, unless *new evidence* of his conduct and/or change in mental state *subsequent to the 2006 parole hearing* is introduced and is sufficient to support a finding that he currently poses an unreasonable risk of danger to society if released on parole") (emphasis in original)). The *Gaul* court thus ordered that the Board be directed "to find Gaul suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of Gaul's conduct in prison subsequent to his 2007 parole hearing supports a determination he currently poses an unreasonable risk of a danger to society if released on parole." *Gaul*, 170 Cal.App.4th at 40. Thus, there exists ample case law by California courts supporting the proposition that the Board's discretion may be limited in the manner recommended by the Magistrate Judge.

C. Motion for A Stay of Proceedings

Respondent argued that the Court should grant a stay of the proceedings, pending the outcome of the Ninth Circuit *en banc* review of *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, 527 F.3d 797 (9th Cir. May 16, 2008).

The Ninth Circuit has acknowledged that this Court "may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). However, the Ninth Circuit has also determined that "once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong v. Immigration and Naturalization Service*, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000). In addition, "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy." *Id.* at 1120. "Special solicitude is required because the writ is intended to be a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Id.* (quoting *Fay v. Noia*, 372 U.S. 391, 400 (1963)). In *Yong*, the Ninth Circuit addressed an analogous situation where the district court issued a stay pending a decision from the Supreme Court. The Ninth Circuit found that although considerations of judicial economy are appropriate, they cannot justify an indefinite and potentially lengthy stay of a habeas proceeding. *Id.* at 1120-1121. Consequently, the Ninth Circuit ruled the district court abused its discretion in granting a stay.

In this case, Respondent requests that the Court stay the proceedings pending a decision in *Hayward*. Like *Yong*, such a stay would potentially be lengthy as it is not clear when the Ninth Circuit will issue its decision in *Hayward*, which has been pending for over a year. Additionally, the nature of this

proceeding, a petition for writ of habeas corpus, implicates special considerations that limit the Court's authority to issue a stay. More importantly, though, there is ample binding precedent from the Ninth Circuit other than *Hayward* which speak to the issues in the petition and discussed in the Findings and Recommendation. *See Superintendent v. Hill*, 472 U.S. 445, 457 (1985); *Biggs*, 334 F.3d at 914; *Sass*, 461 F.3d at 1127-28; *Irons*, 505 F.3d at 851. Pursuant to *Yong*, 208 F.3d at 1119 n. 2, this Court has no authority to await a further ruling from the Ninth Circuit before applying these binding precedents.

D. Certificate of Appealability

Lastly, the Court notes that as Petitioner was challenging the denial of parole, a certificate of appealability, which is generally required under 28 U.S.C. section 2253(c), is not necessary to proceed on appeal to the Ninth Circuit. *See Rosas v. Nielsen*, 428 F.3d 1229, 1231-32 (9th Cir. 2005).

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation issued July 27, 2009, is ADOPTED IN FULL;

2. The Petition for Writ of Habeas Corpus is GRANTED;

3. The California Board of Parole Hearings shall find Petitioner suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of his conduct in prison or change in mental status subsequent to the October 2005 parole consideration hearing is sufficient to support a finding that Petitioner currently poses an unreasonable risk of

danger to society if released on parole. In the absence of any such new evidence showing Petitioner poses a current risk of danger to society based on new evidence, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has lapsed, Respondent shall, within 10 days of the Board's hearing, either release petitioner forthwith if his release date lapsed more than three years earlier, or release petitioner on parole for that period of his three year parole term that remains if the release date lapsed less than three years earlier;

4. Respondent's motion for a stay of the proceedings is DENIED; and

5. The Clerk of Court is DIRECTED to enter judgment.

IT IS SO ORDERED.

Dated: November 20, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

Case 1:08-cv-00571-OWW-JMD Document 20
Filed 7/27/2009 Page 1 of 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL CRAIG SLATER, Petitioner, v. WILLIAM SULLIVAN, et al., Respondents.	1:08-CV-00571 OWW JMD HC FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Michael Slater ("Petitioner") is a State prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation at the California Substance Abuse Treatment Facility in Corcoran, California. (Pet. at 2). Petitioner is serving a sentence of seventeen years to life, pursuant to a conviction on February 20, 1986, of second degree murder with a firearm enhancement. (Pet at 2; Answer at 1)

Petitioner does not challenge his conviction in this action. Instead, Petitioner challenges the decision by the California Board of Parole Hearings (the "Board"), whom he appeared before in October

2005 for a parole consideration hearing. (Pet. M. & A. at 1). The Board found Petitioner unsuitable for parole.

Petitioner subsequently filed a petition for writ of habeas corpus with the California Superior Court, the California Court of Appeal, and the California Supreme Court, challenging the Board's denial of parole. (*See* Answer Exs. 1, 3, 5). The California Superior Court was the only State court to issue a reasoned opinion. (*See* Answer Ex. 2). The California Court of Appeal and the Supreme Court issued summary denials of Petitioner's request for relief. (Answer Exs. 4, 6).

On February 6, 2008, Petitioner filed the instant federal petition for writ of habeas corpus in the Central District of California. (Court Doc. 1). The case was transferred to this Court on April 21, 2008.

On September 3, 2008, Respondent filed a response to the petition. Respondent admits that Petitioner has exhausted his state remedies and that the instant petition is timely. (Answer at 2).

On October 27, 2008, Petitioner filed a reply to the Respondent's answer.

FACTUAL BACKGROUND

As the facts of the commitment offense are relevant to determining whether Petitioner is suitable for parole, the Court recites the facts as stated in the record of the parole hearing. *See* Cal. Code Regs., tit. 15, § 2402(c)(1). The Board first incorporated into the record a summary of the offense, which stated that:

> On 7/9 of 1985 at 9:50 a.m., West Hollywood Sheriff Officers responded to reports of an injured person. When officers arrived, they observed a victim

> who had a large amount of blood on the right side of his head. Paramedics arrived and transported the victim to Cedars Sinai Hospital. The victim was pronounced dead at 1:05 p.m. as the result of severe brain damage and cardiac arrest. An investigation was conducted. Witnesses state that [Petitioner] arrived at the residence at approximately 9:50 a.m. on 7/9 of '85. He was allowed to enter and was led to a bedroom area where he sat for about three minutes. The victim, Gary Boice (phonetic), came a few minutes later. [Petitioner] quickly got up and stepped i front of Boice and prevented him from moving any further. [Petitioner] reached into a briefcase that he was carrying and pulled out a grey revolver. He opened the cylinder of the revolver, spun it around, and closed it. He told the victim, 'This is what we do to people.' He pointed the gun at Boice's right temple, fired one round to the right side of the victim's head. [Petitioner] then said, "Oh, my God. Oh, my God. I'm sorry. I'm sorry.' [Petitioner] then fled, taking the gun and briefcase.

(Traverse Ex. B, Parole Hearing Transcript, at 7-9).

Additionally, the Board read into the record Petitioner's version of events, obtained from a previous parole hearing, which stated:

> I took a taxi to Gil's to pop in and say a brief hello, and possibly sell some drugs. We were talking in his bedroom with[sic] Gary, who had been sleeping

> on the living room couch, woke up, and walked by the bedroom door on his way to the bathroom. Gil stopped him and they began to argue about money. With the taxi waiting downstairs, I soon became impatient. To put a stop to their arguing and allow me to finish up with Gil, I decided to scare Gary. Within their view, I removed all the bullets from my revolver except one. I feigned kind of a Russian Roulette by spinning the cylinder, while secretly watching to make sure the bullet was not in firing position. Then I stepped up to Gary and pointed the gun to his head. I said something to Gil along the lines of 'This is how to play.' And I pulled the trigger. To my shock, and everyone else's, the gun fired, shooting Gary in the head, dropping him to the floor. Pandemonium erupted. I yelled for Gil to call an ambulance, which either he or Jackie, who had been cooking in the kitchen, immediately did. After I calmed down, I thought there wasn't anything I could do to help Gary, and I wasn't ready to turn myself over to the law. So I left with Gil and Jackie and fled the apartment.

(Id. at 9-11).

DISCUSSION

I. Jurisdiction and Venue

A person in custody pursuant to the judgment of a State court may petition a district court for relief by way of a writ of habeas corpus if the custody is in

violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); *Williams v. Taylor*, 529 U.S. 362, 375 n.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution stemming from the Board's denial of parole. Petitioner is currently incarcerated at Corcoran State Prison, which is located in Kings County. Kings County is within this judicial district. 28 U.S.C. § 84(b). Thus, the Court has jurisdiction over and is the proper venue for this action. *See* 28 U.S.C. § 2241(d).

II. ADEPA Standard of Review

All petitions for writ of habeas corpus filed after 1996 are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted by Congress on April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by Lindh*, 521 U.S. 320 (holding AEDPA only applicable to cases filed after statute's enactment)). The instant petition was filed in 2008 and is consequently governed by AEDPA's provisions. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003).

While Petitioner does not challenge his underlying conviction, the fact that Petitioner's custody arises from a State court judgment renders Title 28 U.S.C. section 2254 the exclusive vehicle for Petitioner's habeas petition. *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1126-1127 (9th Cir. 2006) (quoting *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2004) in holding that § 2254 is the exclusive

vehicle for a habeas petitioner in custody pursuant to a State court judgment even though he is challenging the denial of his parole). Under AEDPA, a petition for habeas corpus "may be granted only if [Petitioner] demonstrates that the State court decision denying relief was 'contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.'" *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) (quoting 28 U.S.C. § 2254(d)(1)); *see also Lockyer*, 538 U.S. at 70-71.

As a threshold matter, this Court must "first decide what constitutes 'clearly established federal law, as determined by the Supreme Court of the United States.'" *Lockyer*, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is "clearly established federal law," this Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Id.* (quoting *Williams*, 592 U.S. at 412). "In other words, 'clearly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the State court renders its decision." *Id.*

Finally, this Court must consider whether the State court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law." *Lockyer*, 538 U.S. at 72, (quoting 28 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the State court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the State court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413; see also *Lockyer*, 538 U.S. at 72. "Under the 'unreasonable application clause,' a

federal habeas court may grant the writ if the State court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant State court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the State court's application of clearly established law was "objectively unreasonable." *Id.* at 409.

Petitioner bears the burden of establishing that the State court's decision is contrary to or involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a State court decision is objectively unreasonable. *See Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999).

AEDPA requires that a federal habeas court give considerable deference to State court decisions. The State court's factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). Furthermore, a federal habeas court is bound by a State's interpretation of its own laws. *Souch v. Schaivo*, 289 F.3d 616, 621 (9th Cir. 2002), *cert. denied*, 537 U.S. 859 (2002), *rehearing denied*, 537 U.S. 1149 (2003).

III. Review of Petitioner's Claim

Petitioner raises three grounds for relief, all

alleging that the Board's decision deprived him of the right to due process of the law. (*See* Pet. M. & A.). In his first ground for relief, Petitioner contends that the Board's reliance on the commitment offense to deny him parole violated his constitutional rights. (Id. at 1-4). Petitioner's second ground for relief alleges that the Board improperly relied upon a rules violation to find him unsuitable for parole. (Id. at 5-6). Petitioner asserts as his third ground for relief that his due process rights were violated by the Board's reliance on immutable factors, including Petitioner's criminal misconduct prior to incarceration. (Id. at 7-8). Explicit in each ground for relief is Petitioner's contention that the denial of parole was arbitrary and not supported by "some evidence" as required by the Due Process Clause. The Court initially examines whether the State court's decision, upholding the denial of parole, is an unreasonable application of clearly established federal law. *See Williams*, 529 U.S. at 407-408 (explaining that where there is no factually on-point Supreme Court case, the State court's determination is subject to the unreasonable application clause of 28 U.S.C. § 2254).

A. Legal Standard for Denial of Parole

"We analyze a due process claim in two steps. '[T]he first asks whether there exist a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Sass*, 461 F.3d at 1127. The United States Constitution does not, by itself, create a protected liberty interest in a parole date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). In briefs submitted to the Court, Respondent argues

that Petitioner does not have a liberty interest in parole despite recognizing the existence of Ninth Circuit authority to the contrary. (Answer at 2-3). The Ninth Circuit has held that a prisoner possess a liberty interest in parole where mandatory language in a State's statutory scheme for parole creates a presumption "that parole release will be granted' when or unless certain designated findings are made, and thereby give rise to a constitutional liberty interest.'" *McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002) (quoting *Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 12 (1979) in holding that California's parole scheme gives rise to a cognizable liberty interest in release on parole). California Penal Code section 3041 contains the requisite mandatory language, thus vesting California prisoners "whose sentence provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." *Irons*, 505 F.3d at 850; *see also McQuillion*, 306 F.3d at 903; *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003). Consequently, the Court finds that Petitioner has a protected liberty interest in a parole date.

A finding that a liberty interest exists does not end the Court's inquiry as the Due Process Clause is not violated where the denial of a petitioner's liberty interests follows the State's observance of certain procedural safeguards. *See Greenholtz*, 442 U.S. at 12. In addition to arguing that Petitioner has no federally protected liberty interest in parole, Respondent alternatively argues due process merely entitles Petitioner the right to be heard, advance notice of the hearing, and for the Board to state their reasons for denial. (Answer at 3). This contention is

based on the argument that the "some evidence" standard does not constitute clearly established federal law and is not applicable to parole denials. (*Id.* at 5). Respondent is correct in one respect; a parole release determination is not subject to all of the due process protections of an adversarial proceeding. *See Pedro v. Oregon Parole Board*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). "[S]ince the setting of a minimum term is not part of a criminal prosecution, the full panoply of rights due a Petitioner in such a proceeding is not constitutionally mandated, even when a protected liberty interest exists." *Id.* at 1399; *Jancsek v. Oregon Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987). Thus, an inmate is entitled to receive advance written notice of a hearing, be afforded an "opportunity to be heard" and told why "he falls short of qualifying for parole." *Greenholtz*, 442 U.S. at 16; *see also Pedro*, 825 F.2d at 1399. Here, the Court notes that Petitioner does not allege that he was deprived of any of these rights.

The Ninth Circuit has consistently recognized that a prisoner's due process rights are implicated where there is no evidence to support the denial of parole. *Irons*, 505 F.3d at 851; *see also Sass*, 461 F.3d at 1128-1129. "In *Superintendent, Mass. Correc. Inst. v. Hill* [472 U.S. 445 (1985)] the Supreme Court held that 'revocation of good time does not comport with 'the minimum requirements of procedural due process' unless the findings of the prison disciplinary board are supported by some evidence in the record.'" *Sass*, 461 F.3d at 1128 (citations omitted). The Ninth Circuit has held that the same standard of "some evidence" that applies to the revocation of good time also extends to parole determinations and that this same standard of judicial review applies to habeas petitions regarding parole denials. *Irons*, 505 F.3d at

851; *Sass*, 461 F.3d at 1128-1129. This evidentiary standard prevents arbitrary deprivations of the prisoner's liberty interest without imposing undue administrative burdens or threatening institutional interests. *Hill*, 472 U.S. at 455. Thus, the Court finds that the "some evidence" standard is applicable to Petitioner's denial of parole.

The inquiry of "whether a state parole board's suitability determination was supported by 'some evidence'" is framed by the California statutes and regulations governing parole suitability. *Irons*, 505 F.3d at 851; *see Briggs*, 334 F.3d at 915. Significantly, California's Supreme Court has consistently found that in order to comport with due process, the Board's denial of parole must be supported by "some evidence." *In re Dannenberg*, 34 Cal.4th 1061, 1071 (Cal. 2005); *In re Rosenkrantz*, 26 Cal.4th 616, 625-626 (Cal. 2002) (applying some evidence standard to governor's authority, under Article V, section 8(b) of the California Constitution, to reverse a grant of parole). A federal habeas court defers to a state court's interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) and *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), for the proposition that, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"). Thus, Respondent's contention must fail as California law clearly provides for the additional procedural safeguard of requiring some evidence to support the Board's denial of parole.

The dispositive inquiry now before this Court is whether the Superior Court's decision was an unreasonable application of the "some evidence"

standard. This inquiry is framed by the statutes and regulations governing parole suitability determinations in California. *Irons*, 505 F.3d at 851; *Briggs*, 334 F.3d at 915. California law provides that after an eligible life prisoner has served the minimum term of confinement required by statute, the Board "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for" the prisoner. Cal. Penal Code § 3041(b). "[I]f in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison," the prisoner must be found unsuitable and denied parole. Cal. Code Regs., tit. 15, § 2402(a); *see In re Dannenberg*, 34 Cal.4th at 1078, 1080. The Board decides whether a prisoner is too dangerous to be suitable for parole by applying factors set forth in the California Code of Regulations. *See* Cal. Code Regs., tit. 15, § 2402; *Irons*, 505 F.3d at 851-852; *Biggs*, 334 F.3d at 915-916. The regulations permit consideration of "all relevant, reliable information available to the panel," and explicitly calls for consideration of "the base and other commitment offenses, including behavior before, during and after the crime."[1] Cal. Code Regs., tit. 15, § 2402(b).

[1] The statute specifically states: "All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present

(continued. .)

Factors supporting a finding of unsuitability for parole include: the underlying offense was carried out in an "especially heinous, atrocious or cruel manner"; a record, prior to incarceration for the underlying offense, of violence; a history of unstable relationships with others; and serious misconduct while incarcerated. Cal. Code Regs., tit. 15, § 2402 (c); *see also In re Shaputis*, 44 Cal.4th 1241, 1257 n. 14 (Cal. 2008).

The California Supreme Court has recently held that even where the commitment offense was particularly egregious, reliance on this immutable factor would violate a petitioner's due process rights under the regulations and statutes governing parole suitability in California where:

> evidence of the inmate's rehabilitation and suitability for parole under the governing statutes and regulations is overwhelming, the only evidence related to unsuitability is the gravity of the commitment offense, and that offense is both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur, the immutable circumstance that the commitment offense involved aggravated conduct

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(.continued)
attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstance which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." Cal. Code Regs., tit. 15, § 2402(b).

> does not provide 'some evidence' *inevitably* supporting the ultimate decision that the inmate remains a threat to public safety.

In re Lawrence, 44 Cal.4th 1181, 1191 (Cal. 2008) (emphasis in original).

In *Lawrence*, the California Supreme Court found that a commitment offense that had occurred over thirty years prior to the Governor's reversal of a parole grant was no longer probative of the petitioner's current dangerousness. The *Lawrence* court found that the intervening twenty-four years in which petitioner, now age sixty-one, had demonstrated, "extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole" rendered "the unchanging factor of the gravity of petitioner's commitment offense" no longer probative of "her current threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." *Id.* at 1226.

The *Lawrence* court noted however that there were some circumstances where reliance on a commitment offense would comport with due process, such as where the conviction offense was so heinous, atrocious, or cruel that the gravity of the crime itself established current dangerousness. *Id.* at 1228. Furthermore, the *Lawrence* court observed that a discipline-free record while incarcerated does not automatically render the commitment offense unpredictive of current dangerousness. *Id.* (citing *Lawrence*'s companion case, *In re Shaputis*, 44

Cal.4th 1241, 1259-1260 (Cal. 2008), in concluding that lack of insight into the commitment offense rendered aggravating factor of the crime probative of petitioner's current dangerousness such that Governor's reversal of parole was neither arbitrary or capricious despite an inmate's discipline-free record during incarceration).

B. State Court Decision

After reviewing the record, the Court finds that the California Superior Court unreasonably applied the some evidence standard. *See* 28 U.S.C. § 2254(d)(1). The State court's decision was unreasonable as it conflated the ultimate inquiry, whether Petitioner was currently dangerous, with the inquiry of whether "some evidence" supported an unsuitability factor. The California Supreme Court in *Lawrence* held that, "[t]he relevant determination for the Board and the Governor is, and always has been, an individualized assessment of the continuing danger and risk to public safety posed by the inmate." *Id.* at 1227. The court noted that such a holding was not novel as this "conclusion that current dangerousness (rather than the mere presence of a statutory unsuitability factor) is the focus of the parole decision *is rooted in the governing statute*." *Id.* at 1210-1211 (emphasis added). The *Lawrence* court further reiterated that the decision did not mark a break with previous State court precedents in discussing why its decision would not produce a wave of reversals, explaining that even prior to Lawrence, the "overwhelming majority" of State appellate court's decision affirming a denial of parole "was not founded solely upon the conclusion that the circumstances of the commitment offense were more than what was minimally required to obtain a

conviction of that offense, but rather upon the presence of other additional statutory factors establishing unsuitability." *Id.* at 1228.

Here, it is obvious that the State court conflated the two inquiries as the court assumed that the modicum of evidence supporting a finding that the motive for the crime was trivial meant that Petitioner was currently dangerous. The Superior Court's analysis of whether there was some evidence to support the Board's finding was limited to the following:

> [T]here is some evidence to support the board's finding that 'the motive for the crime is inexplicable or very trivial in relation to the offense'...The Board concluded that the motive for killing this man was a 'cruel joke.' [Citation] Petitioner claimed that the decided to point the gun at the victim because he was impatient at the interference of his drug sale. *This motive is materially less significant than those that conventionally drive people to commit murder; therefore there is some evidence to support the Board's conclusion that petitioner continues to pose a risk of danger to society.*

(Answer Ex. B at 2-3) (emphasis added).

Despite the Superior Court's recognition that its ultimate inquiry was with regard to Petitioner's current dangerousness, the Superior Court's decision focused exclusively on whether there was some evidence to support the trivial nature of the motive. The Superior Court further failed to explain how the trivial nature of the motive, for a crime committed over twenty years previously, was probative of

Petitioner's *current* dangerousness. Considering there is a lack of evidence in the record to indicate that Petitioner actually intended to kill the victim, as discussed *infra*, it is unclear how this factor holds any value in determining Petitioner's current dangerousness. Thus, the State court's *sole* reliance on the trivial nature of the motive was an unreasonable application of the some evidence standard.

C. Parole Board Decision

Therefore, the Court proceeds to examine whether there was some evidence, outside of that cited by the Superior Court, to support the Board's denial of parole. As a federal habeas court may only grant relief if a Petitioner's constitutional right is violated, the existence of some evidence in record would preclude the Court from granting the petition. *See Butler v. Curry*, 528 F.3d 624, 641 (9th Cir. 2008) (citing 28 U.S.C. § 2241(c)(3) in noting that a federal habeas court's finding that State court's decision is contrary to established federal law does not end that court's inquiry as, "[o]ur power to grant the writ of habeas corpus to a state inmate depends on his actually being 'in custody in violation of the Constitution or laws ... of the United States'").

The Board noted that finding Petitioner unsuitable for parole was a difficult decision that they "wrestled with." (Traverse Ex. B at 51). Ultimately, the Board relied on three factors to find that Petitioner currently posed an unreasonable risk of danger to the public safety: (1) the commitment offense, (2) prior criminal misconduct, and (3)

unstable social history.[2] After reviewing the record, the Court finds that the record is devoid of evidence to support the Board's finding that Petitioner currently posed an unreasonable risk of danger to the public.

1. Probative Value of Commitment Offense

State regulations permit consideration of the following factors in determining whether the commitment offense favors the denial of parole: the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; the victim was abused, defiled or mutilated during or after the offense; the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; the motive for the crime is inexplicable or very trivial in relation to the offense. Cal. Code Regs., tit. 15, § 2402(c)(1). Pursuant to California law, "all second degree murders by definition involve some callousness–i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others. As noted, however, parole is the rule, rather than the exception, and a conviction for second degree murder does not automatically render one unsuitable." *In re Smith*, 114 Cal.App.4th 343, 366 (Cal. Ct. App. 2003)

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[2] Contrary to Petitioner's assertion otherwise, his disciplinary infraction 2 does not seemed to have weighed against him. The Board stated with regards to the infraction, "[w]e're not going to get too excited. I asked my partner if he had to dry his laundry in his cell, he would be accused of putting up a huge tent. And he'd get a 128 in a minute. And so you should be commended on one or two chronos [sic] in 20 years." (Traverse Ex. B at 53).

(citations omitted); *see also People v. Nieto Benitez*, 4 Cal.4th 91, 102 (Cal. 1992) (stating "[s]econd degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements–i.e., wilfulness, premeditation, and deliberation–that would support a conviction of first degree murder"). Thus, a showing of exceptional callousness, cruelty, or dispassion for human suffering requires evidence that "the offense in question must have been committed in a more aggravated or violent manner than that ordinarily shown in the commission of second degree murder." *In re Scott*, 119 Cal.App.4th 871, 891 (Cal. Ct. App. 2004); *see also In re Dannenberg*, 34 Cal.4th at 1095 (quoting *In re Rosenkrantz*, 29 Cal.4th 616, 683 (Cal. 2002) for the proposition that reliance on commitment offense as some evidence requires aggravating facts beyond the minimum elements of the offense).

In discussing the commitment offense, the Board concluded that the manner in which the crime was committed was "cruel and callous, dispassionate, calculated." (Traverse Ex. B at 51). The Board seems to have based this finding on the motive of the crime as the shooting itself does not seem particularly egregious. A motive is inexplicable or trivial where it "is one that is unexplained or unintelligible, as where the commitment offense does not appear to be related to the conduct of the victim and serves no other discernible purposes. A person whose motive for a criminal act cannot be explained or is unintelligible is therefore unusually unpredictable and dangerous." *In re Scott*, 119 Cal.App.4th at 893 (further noting that "to fit the regulatory description, the motive must be materially less significant (or more 'trivial') than those which conventionally drive people to

commit the offense in question, and therefore more indicative of a risk of a danger to society if the prisoner is released than is ordinarily presented"); *see also In Barker*, 151 Cal.App.4th 346, 374 (Cal. Ct. App. 2007) (quoting *in re Scott*, 119 Cal.App.4th at 893 for the proposition that, "[g]iven the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not reasonably be deemed 'trivial.' The Legislature has foreclosed that approach, however, by declaring that murderers with life sentences must 'normally' be given release dates when they approach their minimum eligible parole dates").

Here, the record does not contain any evidence that Petitioner's crime exceeded the minimum necessary for second degree murder. The Board itself seemed to have questioned whether Petitioner had the intent necessary for second degree murder, stating that they were unsure if Petitioner meant to kill the victim. (Traverse Ex. B at 51, 52). This statement is based on the factual summaries read into the record that indicates Petitioner intended to scare the victim when he pointed the gun at the victim's head. (Id.). Thus, the Board's finding that the crime was particularly egregious is questionable considering the Board itself questioned whether the crime met the minimum necessary for second degree murder.

More importantly, even if the crime was particularly egregious, the Board failed to explain how the commitment offense offers probative value of Petitioner's current dangerousness considering the time that has lapsed since the crime was committed. *See Irons*, 505 F.3d at 854 (recognizing that continued incarceration based solely on immutable factors, such as the commitment offense, may

eventually rise to the level of a due process violation); *see also Biggs*, 334 F.3d at 917; *In re Lawrence*, 44 Cal.4th at 1228 (rejecting use of the commitment offense to constitute some evidence where the commitment offense is no longer probative of Petitioner's current dangerousness).[3] The Board does not state, nor does the Court find it probable, that the commitment offense is likely to reoccur based solely on Petitioner's motivation. The current case is distinguishable from *Lawrence*'s companion case, *In re Shaputis*. In *Shaputis*, the denial of parole did not violate the petitioner's right to due process as other non-immutable factors existed to support the finding that Shaputis was currently dangerous, such as a lack of remorse. Here, Petitioner has not "failed to make efforts toward rehabilitation... continued to engage in criminal conduct postincarceration, or has shown a lack of insight or remorse," such that "the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense." *Lawrence*, 44 Cal.4th at 1228. Rather, as discussed *infra*, Petitioner's conduct in the intervening two decades was exemplary and demonstrated strong evidence of rehabilitation. *See In re Rico*, 171 Cal.App.4th 659, 680 (Cal. Ct. App. 2009). Thus, the Board's reliance on the commitment offense is erroneous as the commitment offense does not provide insight into whether Petitioner is currently dangerous.

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[3] *Lawrence*, 44 Cal.4th at 1228, made an exception on the reliance of the commitment offense for crimes that were so heinous, atrocious, or cruel that the gravity of the offense itself established current dangerousness. The Court does not find that the instant case to qualify as one of those offenses.

2. Prior Criminal Misconduct

The second factor the Board relied upon in denying Petitioner parole was prior criminal misconduct. California's regulations permit consideration of "all relevant, reliable information available to the panel...such information shall include...past criminal history, including involvement in other criminal misconduct which is reliably documented." Cal. Code Regs., tit. 15, § 2402(b). However, it should be noted that only "previous record of violence" is explicitly listed as an unsuitability factor. Cal. Code Regs., tit. 15, § 2402(c)(2) (stating "[c]ircumstances tending to indicate unsuitability include...[t]he prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age"). Thus, while the Board properly considered Petitioner's prior criminal misconduct, the probative value of Petitioner's prior is questionable at best.

Petitioner's prior criminal misconduct does not evidence an escalating pattern whereby Petitioner progressed from non-violent to violent offenses. Rather, Petitioner's entire criminal history consists of only one violent offense–specifically, the commitment offense. As summarized by the Board, Petitioner's escalating pattern of criminal misconduct consisted of stealing, being a drug dealer, not paying a hotel bill, and various drug violations. (Traverse Ex. B at 52-53). The nonviolent nature of Petitioner's criminal misconduct, which mainly involved possession of narcotics, the probative value of those offenses in determining whether Petitioner currently poses an unreasonable risk of danger to the public safety.

Similar to the commitment offense, the intervening twenty years have also lessened the probative value of these offenses. As noted by the Board, the entirety of Petitioner's prior criminal misconduct relate to his use of drugs. Petitioner's record illustrates that he has participated in selfhelp programming, such as Alcoholics and Narcotics Anonymous, and has not used drugs in the intervening twenty year period. Thus, for the same reasons in which the Board's reliance on the commitment offense was erroneous, the Board's reliance on Petitioner's criminal misconduct prior to incarceration is also misguided. "[T]he Board's decision identified immutable factors, the commitment crime and [prior criminal misconduct], but it did not expressly rely upon petitioner's lack of insight or ability to conform his behavior to the law upon release and failed to relate the identified immutable factors to circumstances that would make them probative of petitioner's current dangerousness." *In re Lazor*, 172 Cal.App.4th 1185, 1203 (Cal. Ct. App. 2009). Nothing in the over twenty year period in which Petitioner has been incarcerated demonstrates that these two immutable factors continue to be probative of Petitioner's current dangerousness in light of the rehabilitative measures

3. No Reliable Evidence of Unstable Social History

"Stable relationships with others favor parole [citation] while 'a history of unstable or tumultuous relationships with others' weighs against parole [citation]." *In re DeLuna*, 126 Cal.App.4th 585, 594 (Cal. Ct. App. 2005) (quoting Cal. Code Regs., tit. 15, §§ 2402 (c)(3), (d)(2)). The Board seemingly found that Petitioner had an unstable social history based

solely on his two year marriage and divorce despite the fact that Petitioner's family wrote support letters offering him residences and jobs. It is puzzling to the Court how one failed relationship resulting in a divorce can constitute "a history of unstable or tumultuous relationships with others." Cal. Code Regs., tit. 15, § 2402(c)(3); *see Bair v. Folsom State Prison*, 2005 WL 2219220 (E.D. Cal. 2005) (noting that, "[h]aving been divorced does not necessarily demonstrate a history of unstable or tumultuous relationships" in finding that five divorces does demonstrate history of unstable relationships); *see also Saunders v. Carey*, 2009 WL 426650 (E.D. Cal. 2009) (noting that there is no reliable evidence of an unstable social history indicative of current dangerousness even where petitioner had been divorced twice). Indeed, the phrasing of the statute seems to indicate, specifically the use of the phrase "a history" and the plural form of "relationships with others", would suggest that more than one failed relationship is required. More importantly, though, it is unclear how Petitioner's failed marriage over twenty years ago evidences his current dangerousness.

Rather, the intervening events of the last two decades strongly suggests that Petitioner has rehabilitated and no longer poses an unreasonable risk of danger to society. The Board did discuss the plethora of factors tending to support suitability. (Traverse Ex. B at 54). As factors tending to support parole, the Board commended Petitioner for his disciplinary record while incarcerated noting the existence of only one disciplinary infraction for non-

violent behavior.[4] (Id. at 53). Petitioner participated in vocational courses for optical technology, plumbing, roofing and carpentry, eventually obtaining an optician's certificate license. (Id. at 21-22, 31). Petitioner improved himself educationally, taking classes in management, accounting, health, and business mathematics. (Id. at 24). Petitioner volunteered as a tutor and coordinator for a literacy program for fellow inmates. (Id. at 27). Furthermore, Petitioner completed self-help classes, including courses in self-confrontation and anger management, while attending weekly Alcoholics Anonymous meetings. (Id. at 25-26). The psychological evaluation was favorable as the report noted that Petitioner had "good insight into his behavior and the emotionality that went with it," and that Petitioner has "gained knowledge and insight into the danger of drugs." (Id. at 29). More importantly, though, the psychological evaluation revealed that Petitioner would pose less risk of danger than the average citizen if released into the community. (Id. at 55, 29). The record also reveals that Petitioner has viable parole plans, with both parents offering him a place of residence and a job.[5] (Id. at 55).

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[4] The record evidences that this infraction resulted from Petitioner hanging his laundry in his cell, an activity referred to as tenting.

[5] The Board's criticism that Petitioner lacks a "Plan B" in case "[w]e do have Katrina come through West LA and destroy your commercial property, you don't want it anymore" is not supported by the record, which indicates Petitioner's mother also offered her residence to Petitioner and that Petitioner has a vocational skills in manufacturing optical lenses. (*See* Traverse Ex. B at 17, 21, 30-32).

In sum, it would seem that "all of the information in [the] postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety." *See Lawrence*, 44 Cal.4th at 1227. While the "some evidence standard is minimal, and assures that 'the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary,'" the Court finds record here is devoid of any evidence demonstrating that Petitioner poses a current risk of unreasonable danger to the public safety. *See Sass*, 461 F.3d at 1129 (quoting *Hill*, 472 U.S. at 457).

REMEDY

In examining the remedies available to Petitioner, the Court initially notes that "federal habeas courts have 'broad discretion in conditioning a judgment granting habeas relief and in 'dipos [ing] of habeas corpus matters 'as law and justice require.'" *Milot v. Haws*, 2009 WL 2046857, *3 (C.D. Cal. 2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)); *see Burnett v. Lampert*, 432 F.3d 996, 999 (9th Cir. 2005) (stating that federal courts "have a fair amount of flexibility in fashioning specific habeas relief"); *see also Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994) (noting that federal habeas court is vested with the largest power to control and direct the form of judgment to be entered). The district court in *Milot* rejected the assertion that the only remedy available to a habeas petition challenging the denial of parole by the Board was a new parole consideration hearing, noting that "[i]n the context of parole decisions that violate due process, there is no federal law holding that the only remedy available to a federal habeas court is a remand to the Board for a

new hearing." *Milot*, 2009 WL 2046857, *3. Additionally, the district court observed in *Milot* that recent decisions by the California courts suggest that California law permits a remedy beyond a new hearing without restrictions on the Board's consideration. *Id* at 4.

RECOMMENDATION

Therefore, in accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus be GRANTED; and

2. Judgment be entered granting a writ of habeas corpus as follows: The Board shall find Petitioner suitable for parole at a hearing to be held within 30 days of the order adopting this decision, unless new evidence of his conduct in prison or change in mental status subsequent to the October 2005 parole consideration hearing is introduced that is sufficient to support a finding that Petitioner currently poses an unreasonable risk of danger to society if released on parole; and in the absence of any such new evidence showing Petitioner's unsuitability for parole, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has passed, Respondent shall, within ten (10) days of the Board's hearing, release Petitioner from custody. With respect to his presumptive period of parole, Petitioner is to be credited for any time that has lapsed since the release date calculated by the Board or when a finding of suitability at the October 2005 parole consideration hearing would have become final pursuant to California Penal Code sections 3041(b) and 3041.2(a)), whichever is later.

This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(c). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 27, 2009
/s/ John M. Dixon
UNITED STATES MAGISTRATE JUDGE

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Help	Lower Court
Opinions	
C/C	

Docket (Register of Actions)
SLATER ON HABEAS CORPUS
Case Number S156366

Date	Description	Notes
09/17/2007	Petition for review filed	Michael Craig Slater, Petitioner in pro per
09/18/2007	Record requested	
09/18/2007	Received Court of Appeal record	
11/14/2007	Petition for review denied	

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MICHAEL CRAIG SLATER, On Habeas Corpus.	B201547 (Super. Ct. No. A092326)

THE COURT:

The Court has read and considered the petition for writ of habeas corpus filed August 24, 2007. The petition is summarily denied.

COURT OF APPEAL-SECOND DIST.
FILED
SEP 6 - 2007
Joseph A. Lane Clerk
J. Guzman Deputy Clerk

/s/ /s/ /s/

BOREN, P. J. DOI TODD, J. CHAVEZ, J.

FILED
Los Angeles
Superior Court
MAY 04, 2007
John A. Clarke,
Clerk
By /s/Joseph M. Pulido Deputy
Joseph M. Pulido,
S.C.C. 233219

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re, MICHAEL SLATER, Petitioner, On Habeas Corpus	Case No.: BH004061 ORDER RE: WRIT OF HABEAS CORPUS

The Court has read and considered petitioner's Writ of Habeas Corpus filed on June 15, 2006. Having independently reviewed the record, giving deference to the broad discretion of the Board of Parole Hearings ("Board") in parole matters, the Court concludes that the record contains "some evidence" to support the Board's finding that petitioner is unsuitable for parole (See Cal. Code Reg. Tit. 15, §2402; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667 (hereafter *Rosenkrantz*).)

Petitioner was received in the Department of Corrections on September 19, 1986 after a conviction for second-degree murder with use of a firearm. He was sentenced to fifteen years to life plus two. His minimum parole eligibility date was November 5, 1996. The record reflects that on July 9, 1985, petitioner arrived at a friend's house in the morning to sell drugs. The victim, who had been sleeping on the couch, awoke and entered the bedroom where the transaction was taking place and began arguing with petitioner's friend. Petitioner became impatient and decided to scare the victim. He drew a revolver from his briefcase, removed all but on bullet, spun the cylinder while, according to the petitioner, he watched to make sure the bullet was not in firing position. He then held the gun to victim's head and pulled the trigger. Petitioner claimed to be shocked to find that the bullet was in firing position. He yelled for someone to get an ambulance. He fled from the apartment to avoid the police. The victim died later that day from the head wound.

The Board found petitioner unsuitable for parole after a parole consideration hearing held on October 27, 2005. Petitioner was denied parole for one year. The Board concluded that petitioner was unsuitable for parole and would pose an unreasonable risk of danger to society and a threat to public safety. The Board based its decision on several factors, including his commitment offense.

The Court finds that there is some evidence to support the board's finding that "the motive for the crime is inexplicable or very trivial in relation to the offense" (Cal. Code Regs., tit. 15, §2402, subd. (c)(1)(E).) "To fit the regulatory description, the motive must be materially less significant (or more "trivial") than those which conventionally drive

people to commit the offense in question, and therefore more indicative of a risk of danger to society if the prisoner is released than is ordinarily present." (*In re Scott* (2004) 119 Cal.App.4th 871, at 893). The Board found that putting a gun against someone's head was "just an exceptionally stupid thing to do." (*Reporter's Transcript*, October 27, 2005, p. 52.) The Board concluded that the motive for killing this man was a "cruel joke." (*Id.*) Petitioner claimed that he decided to point the gun at the victim because he was impatient at the interference of his drug sale. This motive is materially less significant than those that conventionally drive people to commit murder; therefore there is some evidence to support the Board's conclusion that petitioner continues to pose a risk of danger to society.

Accordingly, the petition is denied.

Dated: 5/4/07

/s/ Steven Van Sicklen
STEVEN VAN SICKLEN
Judge of the Superior Court

Clerk to give notice.

CALIFORNIA BOARD OF PAROLE HEARINGS

D E C I S I O N

DEPUTY COMMISSIONER ESTRADA: Okay. We're back on record.

PRESIDING COMMISSIONER SAWYER: The panel has reviewed the information received from the public and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society and a threat to public safety if released from prison. We wrestled with this. We – we did wrestle with this, because of what I'm going to be saying here, and the nice stuff that I'm going to be saying in a few minutes. But we're real – we're still hung up on the way this cruel and callous, dispassionate, calculated manner of this. We're not sure if you tried to execute, or if you executed this guy or not. Now, we're not going to debate it. Okay. You seemed a lot smarter, and of course, you were under the – you were spending a lot of time, and your brain was burning pretty good back in those days 20 years ago. But you seem – given your history, given your upbringing, to not be able to count the number of bullets in a weapon, and not understand a revolver and how it works, that it turns every time you pull the trigger. It turns first. So if you put – if you set the bullet on the right or the left side, depending on if it's a Smith & Wesson, it goes on way – if it's a Colt, it goes the other way, and – and puts the cartridge in the barrel, in the center. So it's – it's somewhat baffling to us. And again – and I'm not – and you'll never hear me blame drugs or alcohol on – on causing crime, because they don't cause anything. It's the person who ingests. But you just seem like a smarter

guy than that, to let something like that go, if you didn't perhaps intend that to happen. Now one is second degree, so we're not retrying this case. It's just incredibly stupid. Let's write it off to stupid at this point. It was – to put a gun to anybody's head, even empty, is not the brightest thing to do in the world. You were living in a different world, I think, at that point in your life. And – and the – it's just an exceptionally stupid thing to do. I mean, Mr. Boice wasn't even armed. You know, he didn't have a chance. He was the victim or a cruel joke, if that's the way we want to characterize this. But it was quite the offense, in which everyone lost. He lost the most. You do have – in your previous record that we always talk about and we look into. I guess we can see that we did see an escalating pattern of criminal conduct. You were involved with criminal behavior, stealing from the UCLA lab, being a drug dealer, not paying your bill at hotel, unstable, tumultuous, married for two years, just bouncing off the walls, from the sound of it. You did some time at the County Jail. You had a variety of drug violations in your – in your prior history with the LA's Sheriff's Office, LAPD, Placerville Sheriff, and this is drug, drug, drug, drug, drug, and up to the commitment offense. You can't believe how many – you know, as we sit and do hearing all day long, you can almost predict. You want to scream at people and say you're not going in the right direction here. It's getting worse and worse, and it's having an effect on all aspects of your life, your relationships and everything. Your institutional behavior – I'm not going to get too excited about the tenting issue here. We're not going to get too excited. I asked my partner if he had to dry his laundry in his cell, he would be accused of putting up a huge tent. And he'd

get a 128 in a minute. And so you should be commended on one or two chromos in 20 years. There's no question about that. It seemed like you might have been a little hard-headed, which is what we don't like to see. And when it came to – when you talked about Mrs. Bush, who you obviously weren't getting along with, she was – you're not going to be able to blame her for this. You're going to have to take the responsibility yourself. But it – you know how the program works. You've been here long enough. You're a senior citizen here as far as that's concerned. Not that I meant in the normal sense of 50. You're just half way through, especially with your family's longevity. So you're doing – you're doing find there. And you don't look 50 either. So apparently the drugs didn't have a long-lasting effect on you. Particularly – we're particularly impressed with the two that we know that you have certifications for – the optician – that's really solid – plumbing certificate, carpentry. We would like you to get your carpentry certificate and your roofing certificate – those completions. Get them into your C File. You're to be commended for your being a tutor and general studies. You've been in Breaking Barriers, Life Plan for Recovery, Alternatives to Violence, Hands of Peace, Self-Confrontation, Anger Management. You've taken class work in management, accounting, health, business and math. You've got another course called Management through Meditation, Friends Outside, volunteered in the literacy program. And these tutoring and volunteering programs are generally as good for you as they are for the individual.

INMATE SLATER: Thanks.

PRESIDING COMMISSIONER SAWYER: They're a therapy to you. So we'd like to see you keep

doing that. I'd like to see you keep doing AA and NA. There are programs you can get in there, because that's gonna be your lifeline to the outside when you do get your parole date.

INMATE SLATER: Okay.

PRESIDING COMMISSIONER SAWYER: There's no doubt in my mind that you'll get a parole date. And you're doing very well when it comes to this. The psychiatric report was positive, all the way back to the year after he was born.

MS. TARDIFF: Since before.

PRESIDING COMMISSIONER SAWYER: How many did you read? Three of them?

MS. TARDIFF: (laughing) Yes.

PRESIDING COMMISSIONER SAWYER: Okay. Your dad, Ernest, sent a nice letter. Your mom sent a nice letter. He's got, as he says, a beautiful condo on the west side, West LA. And he's offered you not only a place to live, and he's looking for care and wants to turn the business – from the looks of it, wants to turn the business over to you. And that's Slater's Commercial Rentals. And where are his rentals? Mostly in West LA?

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: There was opposition, however, from Los Angeles County District Attorney's Office, represented by Mrs. Delagarza. And she drug a few things out that needed to be drug out, I believe, and put on the record. It should also be noted that you were in the military as a pharmacist specialist and did get an honorable discharge.

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: Did we ever find that in the C File? We'd like to see that in the C File if you can find it or get it. We're

going to deny you for one year. No more 115s, 128s. Continue your self-help. Stay discipline free. Earn the positive chronos. And I want to note for the record that LAPD did send a letter, but it's for Craig Michael Slater. Have you ever been mixed up with anybody else?

INMATE SLATER: No.

PRESIDING COMMISSIONER SAWYER: Okay. But he does have your CDC number. But it's a whole different crime. You were robbing a gas station on that one. And for the record, this is a mistake, because there was no robbery at a gas station by this -- by this inmate. I had to get that on the record. Okay. Mr. Estrada?

DEPUTY COMMISSIONER ESTRADA: Mr. Slater. Okay. Let's start getting serious now, okay? You need to start bringing in documentation. If you do have a certificate for roofing, for carpentry, your high school diploma, your DD214. I mean, just start getting serious about, like how it says, you're getting close to 50 years old. You've been here for quite a few years. Get down to the nitty gritty and start getting those documents. They will help you, okay?

INMATE SLATER: Yes.

PRESIDING COMMISSIONER SAWYER: It can't hurt you by having Plan Bs, either. Plan B to go stay with someone else, at least initially. I know your dad's plan is solid. You know, I can have a good feeling about that. It makes you not want to look for anything else. But if we do have Katrina come through West LA and destroy your commercial property, you don't want it anymore. You don't want to be there. You know, you never know. I mean, quite frankly, LA's earthquake city. So I'm sure he'd diversified enough to not worry about that. But if you want to impress the Board – and I'm not saying

to impress the Board, because we're very much realists – and the real issue is you've got a marketable skill here. Let's see what you might be able to do as a backup plan in case your dad gets mad at you and throws you out of the house – out of the condo – beautiful condo he's got. And then you need a job at Lenscrafters or something else. I'm not saying to get it renewed and take the test, unless you can.

INMATE SLATER: I believe that's possible.

PRESIDING COMMISSIONER SAWYER: Okay. But you've got that skill, and that's a real – that's a good, almost a while collar skill. And there's lots of companies that – so just get the West LA phonebook or whatever, and find out how many places hire people with this kind of skill in the West Los Angeles are where you can jump on a bus and get to it, because gas is three bucks a gallon now.

INMATE SLATER: That's what I've heard.

PRESIDING COMMISSIONER SAWYER: Yeah. So is a loaf of bread. So it's – it's expensive to live out there. And I know, again, you think you've got that covered, and you probably do. But – but the next panel is going to hear you, and they're going to say, man, this guy is hard to turn down. Also, if – if you could get us a little more idea of what, you know, how many commercial buildings. We don't want to look at the numbers. We don't want to see a business plan of your father's, but you might have a modified business plan so that we have confidence that you going into there, you're going to go in a hit the ground running. Okay. What I'm going to do in the next five years with my dad's commercial property. You know, there's things to do. Talk about all the issues. You've got maintenance issues. You've got bill collecting, you've got debts, you've got all kinds of

things that are stressful, unless you've given them some thought. Okay?

INMATE SLATER: All right.

PRESIDING COMMISSIONER SAWYER: All right. Good luck to you.

INMATE SLATER: Thanks. I appreciate it.

PRESIDING COMMISSIONER SAWYER: We've got a lot of confidence in you.

INMATE SLATER: Okay. I appreciate that. Thank you for your advice.

PAROLE DENIED ONE YEAR.

THIS DECISION WILL BE FINAL ON: _____

YOU WILL BE PROMPTLY NOTIFIED, IF PRIOR TO THAT DATE, THE DECISION IS MODIFIED.